No. 15953

United States Court of Appeals

for the Ninth Circuit

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-16-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

KENNETH A. BARWICK,
7918½ Broadway,
Lemon Grove, California;

HAYDEN C. COVINGTON,
124 Columbia Heights,
Brooklyn 1, New York.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

JOHN K. DUNCAN,
Assistant U. S. Attorney,
U. S. Customs & Courthouse Building,
San Diego 1, California.

In the United States District Court in and for the Southern District of California, Southern Division

No. 26877-SD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLIN CONSTANTINE VENUS,

Defendant.

July, 1957, Grand Jury—Southern Division

INDICTMENT

(U.S.C., Title 50, App., Sec. 462-(a); Universal Military Training and Service Act.)

The Grand Jury charges:

Defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said board being then and there duly created and acting, under the Selective Service System established by said act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on

November 8, 1955, in San Diego County, California, in the division and district aforesaid; and [2*] at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ CHARLES G. ARNOLD,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed August 8, 1957. [3]

[Title of District Court and Cause.]

GOVERNMENT'S REQUESTED INSTRUCTIONS TO THE JURY

Instruction No. 1

The Indictment charges that defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said board being then and

*Page numbering appearing at foot of page of original Certified Transcript of Record.

there duly created and acting, under the Selective Service System established by said act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do. [5]

Instruction No. 2

The Indictment in this case is brought under the Universal Military Training and Service Act, which provides in pertinent part as follows:

> "Any person who * * * knowingly * * * evades or refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required by him under this (Universal Military Training and Service Act) or rules or regulations * * * made pursuant to this (Universal Military Training and Service Act) * * * shall * * * be punished," as provided by law. [6]

Instruction No. 3

The Universal Military Training and Service Act, portions of which I have previously read to you, was passed by the Congress of the United States pursuant to authority given to the Congress by the Constitution to provide for the defense of the nation. You are not here concerned with the wisdom or unwisdom of this statute. It is the duly promulgated law of the land and you must be governed by its mandate in the consideration of the evidence and in the determination of this case.

To better understand this law, I shall summarize some of its provisions for you.

The law provides that it shall be the duty of every male citizen of the United States who is between the ages of 18 and 26, on the day or days fixed for registration, to present himself or submit himself to registration.

The President is authorized to select and induct into the armed forces of the United States for training and service those registrants who have been selected in an impartial manner under such rules and regulations as the President may prescribe.

The Act further authorizes the President to prescribe the necessary rules and regulations to carry out the provisions of the Act, and to establish Selective Service civilian boards, including local boards and appeal boards. The local boards, under the terms of the Act, have power to hear and determine all questions or claims with respect to induc-

tion in or exemption or deferment from training and service, and the decisions of such local boards are final, except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

If any registrant is dissatisfied with his classification by his local board, or if his claim for exemption from service is denied by such local board, he then may appeal to his appropriate [7] appeal board within a fixed time prescribed by the Selective Service Regulations and may appeal from each new classification or reclassification by the appeal board.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, viz., to report for induction into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly. [8]

Instruction No. 3-A

You are instructed that the classification 1-A means that a registrant is available for military service.

(32 C.F.R. 1622.2) [9]

Instruction No. 4

You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find that:

(1) The defendant on or about November 8, 1955, was a registrant of Local Board No. 140 in San Diego County, California.

(2) That at such time in such place, the defendant was classified in Class 1-A by said Board.

(3) That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.

(4) That the defendant did on such date, and at all times thereafter, knowingly fail to report for induction. [10]

Instruction No. 5

The word "knowingly" as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.

(Browder v. United States—
312 U.S. 335 (p. 341)) [11]

Instruction No. 6

Evidence has been offered by the defendant to the effect that he never received the Order to Report

for Induction. You are instructed that the Selective Service Regulations which are passed pursuant to law provide that "* * * the mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

(32 C.F.R. 1641.3) [12]

Instruction No. 7

You will note that the Indictment charges the defendant failed to report for induction into the armed forces of the United States on November 8, 1955.

The Selective Service Regulations which are passed pursuant to law provide that "When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty."

In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense as charged.

(32 C.F.R. 1642.2)

(Silverman v. U.S.
220 F 2 36 CA 8 (1955))

LAUGHLIN E. WATERS,
United States Attorney;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney.

[Endorsed]: Filed November 14, 1957. [13]

[Title of District Court and Cause.]

JURY INSTRUCTIONS

Comes now the defendant, Carlin Constantine Venus, and respectfully submits the attached Jury Instructions and requests that the Court give the same. [14]

Defendant's No. 12

Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed, but no such presumption arises unless it appears that the person to whom sent resided at the place to which it was mailed.

Kansas City Life Ins. Co. v. Cox,
104 F 2d 321

Leahy v. U. S.,
15 F 2d 949 [27]

Defendant's No. 13

The presumption of receipt from mailing cannot be based upon the presumption, unsupported by direct evidence, that a public officer performed his or her duty in mailing a notice.

Gregory v. Kirkman Consol. Indep. School Dist.,
186 Iowa 914, 173 N.W. 243 [28]

Defendant's No. 14

Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing.

U. S. v. Rice,
281 F 326 [29]

Defendant's No. 15

To establish mailing of a letter containing a notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle and, in addition, there must be testimony of the employee whose duty it was to deposit the mail in the post office that he or she either actually deposited that mail in the post office or that it was his or her invariable custom to deposit every letter in the usual receptacle.

U. S. v. Rice,
281 F. 326 [30]

Defendant's No. 16

Where a party has abandoned the address to which a letter was addressed prior to sending, no presumption of receipt arises from posting.

General Acc. Fire & Life Assur. Corp. v.
Pacific Coast Casualty Co.,
247 F. 416, 159 CCA 470 [31]

Defendant's No. 17

There is a presumption that a letter or postal card properly addressed, stamped and duly mailed by the addressor was received by the addressee in the due course of mail. [32]

Defendant's No. 18

If you should find that the defendant has not been given due notice to report for induction pursuant to the Selective Service Regulations, then you are bound to find that the defendant did not have a continuing duty to report. [33]

Defendant's No. 19

The defendant is being charged with failure to report for induction on November 8, 1955, in San Diego County, California, and any evidence concerning his failure to report after said date shall be disregarded by you in determining whether or not the defendant has performed the acts required of him under the Universal Military Training and Service Act. [34]

Defendant's No. 20

The defendant is being charged with failure to report for induction and not for failure to submit to induction, and therefore any evidence bearing on the question of whether or not defendant intended to submit to induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report. [26]

Defendant's No. 21

If you should find that an order to report for induction was not mailed to the defendant's last known address, then you must return a verdict of not guilty. [35]

Defendant's No. 22

If you should find that no due notice to report for induction was given to the defendant, then a verdict of not guilty must be returned. [36]

Defendant's No. 23

You shall not consider the defendant's failure to report after November 8, 1955, as an offense since anything he did after that date has no bearing on the question of whether or not he failed to report on November 8, 1955. The defendant cannot have a continuing obligation to report if you find that he never received an order to report. The only time the defendant would have a continuing obligation to report would be if he had received an order to

report. The defendant would have to be charged specifically with a failure to observe this continuing duty to report. The indictment in this case does not so charge the defendant. [37]

Defendant's No. 24

You are entitled to take into consideration both the prior actions and the subsequent actions of the defendant in determining whether or not he, in good faith, attempted to comply with the Selective Service Regulations and the Universal Military Training and Service Act. [38]

Defendant's No. 25

If you should find that the defendant contacted his Local Board upon learning that he had been reported delinquent, and said Board, through its agents or employees, informed the defendant that there was nothing that they could do, but that the matter was up to the United States Attorney's Office, then you should find that the plaintiff has waived its rights in requiring the defendant to make any further report.

/s/ KENNETH A. BARWICK

[Endorsed]: Filed November 14, 1957. [39]

[Title of District Court and Cause.]

MINUTES OF THE COURT
NOVEMBER 14, 1957

Present: Hon. Jacob Weinberger, District Judge; U. S. Atty., by Assistant U. S. Atty. John K. Duncan. Counsel for the Defendant: Kenneth Barwick.

Defendant is present on bond.

Proceedings: Further Jury Trial.

Both sides answer ready, It Is Ordered that this trial proceed.

William McManis is called, sworn and testifies for the Defense.

Both sides rest.

The Jury is excused at 10 a.m. and in the absence of the jury Attorney Barwick moves for judgment of acquittal. Later, It Is Ordered motion denied.

At 2:27 p.m. Counsel argue to the Jury.

At 3:27 p.m. the Jury is excused until November 15, 1957, at 9:45 a.m. for further proceedings, and court and counsel in the absence of the jury discuss legal matters and later recess.

JOHN A. CHILDRESS,
Clerk;

/s/ E. M. ENSTROM, JR.,
Deputy. [41]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant, Carlin Constantine Venus, Guilty as charged in the Indictment.

/s/ JAMES R. LEWIS,
Foreman of the Jury.

Dated: November 15, 1957, San Diego, California.

[Endorsed]: Filed November 15, 1957. [40]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting testimony of the witness Helen A. Haisch to which objections were made.

5. The Court erred in charging the jury and in refusing to charge the jury as requested.

Dated: November 18, 1957.

Respectfully submitted,

/s/ KENNETH A. BARWICK,
Attorney for Defendant.

Points and Authorities

Rule 33 Federal Rules Criminal Procedure.

Affidavit of service by mail attached.

[Endorsed]: Filed November 20, 1957. [42]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a Judgment of Acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the Indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the Indictment.

3. The undisputed evidence shows that the defendant is not guilty as charged.

4. The Universal Military Training and Service Act as construed and applied by the regulations thereunder, and more particularly Section 1641.3 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

5. Section 1641.3 of the Selective Service Regulations [44] deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

6. The Universal Military Training and Service Act as construed and applied by the regulations thereunder and more particularly Section 1642.2 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

7. Section 1642.2 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

Wherefore, the defendant prays that a Judgment of Acquittal be rendered and entered.

Respectfully submitted,

/s/ KENNETH A. BARWICK,
Attorney for Defendant.

Points and Authorities

Rule 29 Federal Rules Criminal Procedure.

[Endorsed]: Filed November 20, 1957. [45]

[Title of District Court and Cause.]

MINUTES OF THE COURT
DECEMBER 2, 1957

Present: Hon. Jacob Weinberger, District Judge; U. S. Atty., by Assistant U. S. Atty.: John K. Duncan. Counsel for Defendant: Kenneth Barwick.

Defendant present on bond.

Proceedings:

For (1) hearing motion of defendant for new trial, (2) hearing report of Probation Officer and sentence. (Verdict of guilty.)

Attorney Barwick renews motion for judgment of acquittal. Court orders said motion denied.

Court orders motion for new trial denied.

It Is Adjudged that defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

eighteen months and pay a fine in the sum of $500 unto United States, for offense charged in the one count of the Indictment.

It Is Adjudged that execution of sentence is hereby stayed until December 13, 1957, at 10 a.m.

JOHN A. CHILDRESS,
Clerk;

By /s/ E. M. ENSTROM, JR.,
Deputy Clerk.

JW-12/2/57. [46]

United States District Court for the Southern District of California, Southern Division

No. 26,877-Criminal

UNITED STATES OF AMERICA

vs.

CARLIN CONSTANTINE VENUS

JUDGMENT AND COMMITMENT

On this 2nd day of December, 1957, came the attorney for the government and the defendant appeared in person and by counsel, Kenneth Barwick.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of knowingly failing to report for induction into the armed forces of the United States, in violation of U.S.C., Title 50, App., Sec.

462(a), as charged in the Indictment in one count, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen months and pay a fine in the sum of $500.00 unto the United States.

It Is Adjudged that execution of sentence is hereby stayed until December 13, 1957, at 10:00 a.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed December 2, 1957. [47]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The appellant is Carlin Constantine Venus and he resides at 302 Market Street, Apartment 3, Venice, California.

The attorneys for the appellant are Hayden C. Covington, Attorney at Law, 124 Columbia Heights, Brooklyn 1, New York, and Kenneth A. Barwick, Attorney at Law, 7918½ Broadway, Lemon Grove, California.

The appellant was charged with wilfully and knowingly violating a duty required by the Universal Military Training and Service Act.

The appellant was sentenced to confinement in a federal institution for a period of 18 months on the 2nd day of December, 1957; execution of said judgment having been stayed until December 13, 1957.

The appellant is not at this time in any institution but remains out on bail.

I, the above-named appellant, hereby appeal to the United [48] States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 6th day of December, 1957.

/s/ CARLIN CONSTANTINE VENUS,
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 10, 1957. [49]

In the United States District Court Southern District of California, Southern Division

No. 26877—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARLIN CONSTANTINE VENUS,

Defendant.

Honorable Jacob Weinberger, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California

November 13, 14, 15, 1957
December 2, 1957

Appearances:

For the Plaintiff:
LAUGHLIN E. WATERS,
United States Attorney, By
JOHN DUNCAN,
Assistant United States Attorney.

For the Defendant:
KENNETH A. BARWICK, ESQ.

* * *

HELEN A. HAISCH

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated please by the flag? Please state your name.

The Witness: Helen A. Haisch. [6*]

The Clerk: The last name is spelled how?

The Witness: H a i s c h.

The Clerk: H a i s c h?

The Witness: Yes, c h, yes.

The Clerk: Thank you.

Direct Examination

By Mr. Duncan:

Q. Is that Haisch (Haish) or Haisch (Hoish)?

A. Haisch (Hoish).

Q. It is Mrs. Haisch? A. Yes.

Q. Mrs. Haisch, would you tell us please your business or occupation.

A. I am clerk of Local Board 140 for selective service system.

Q. And how long have you been employed in that capacity? A. Since 1950.

Q. Tell us something about the duties of a local board clerk, Mrs. Haisch, generally and briefly.

A. Well, she is, first of all, of course, charged with the custody of all the files in her local board. She takes care of all correspondence and sees that it is filed in the folder of the registrant to whom it

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Helen A. Haisch.)

belongs. And she attends board meetings, takes care of all the files for the board members; and, if there are personal appearances, she takes the [7] notes and keeps a record of all those. We keep a record of all classifications. And, well, my job is really very——

Q. It covers a broad field? A. It does, yes.

Q. Tell me, Mrs. Haisch, do you have custody personally of the selective service file of the defendant, Carlin Venus? A. Yes, I have.

Q. Are you the person that is charged with that custody? A. Yes.

Q. Do you have it with you today?

A. Yes, I have.

Mr. Duncan: May I have this file marked for identification, your Honor.

The Court: Government's 1.

The Clerk: It is so marked, your Honor.

(Defendant's Selective Service File marked as Government's Exhibit No. 1 for Identification.)

Q. (By Mr. Duncan): I am now handing you the file that you just handed me, Mrs. Haisch. Would you describe to us, if you will please, just what that is. A. This is the file—you mean the——

Q. The whole exhibit there.

A. Well, this is the complete file of all the records for this registrant since the day he registered.

Q. To your knowledge, that is a full and complete file; [8] is that right?

(Testimony of Helen A. Haisch.)

A. Yes. Yes, that is true. Everything pertaining to him that has been sent into the office is in this file.

Q. You are required by regulations, are you not, to keep that file all together?

A. Yes. Oh yes, absolutely.

The Court: That has to do with the case of the defendant?

The Witness: Yes, sir. This particular registrant, yes, sir.

Q. (By Mr. Duncan): That is the file of Carlin Venus, isn't it? A. Yes, it is.

Q. Those records that are contained in that file, Exhibit for Identification Number 1, Mrs. Haisch, are they prepared in the routine of the operation of the board, as a routine procedure to prepare those records? A. Yes. Yes, it is.

Q. Mrs. Haisch, you have seen the defendant, Carlin Venus, before, have you not?

A. Yes, I have.

Q. And do you recall about the last time you saw him?

A. Well, the last time, I don't recall the exact date. It was, oh, probably a month or so ago; he——

Q. And did you see him some time before [9] that? A. I have seen him before that; yes, sir.

Q. And do you recall the time preceding about a month ago that you saw him?

A. Yes, I do. That was in April when he was in the office.

Q. Is that April of this year? A. Yes, sir.

(Testimony of Helen A. Haisch.)

Q. And do you recall the specific date, by any chance? A. Well, April the 25th was the date.

Q. And where was it that you saw him at that time? A. In the office; our office.

Q. And did you have any conversation with him?

A. Yes, I did.

Q. Was anybody else present at that conversation? A. He brought with him a friend.

The Court: I beg your pardon?

The Witness: He brought a friend with him at the time, and also our co-ordinator, Mrs. Huckaby, in the office.

Q. (By Mr. Duncan): Did he tell you what the friend's name was, do you recall, by any chance?

A. I don't recall the name. However, it is written in the note that I wrote for me, because he wanted a friend to help him.

Q. What happened that day?

A. Well, he came into the office, and he had with him [10] his typewriter and asked that he could copy some of the information from his file.

Q. Did you give him the file?

A. No, I did not. I took him into the office, and we sat down at a desk, and I opened the file and told him that he could copy anything he liked out of it, in my presence, of course.

Q. Did you see him look through the file?

A. Yes, I did.

Q. Did he go through the whole file? Did you see him? A. Yes. Yes, sir, he did.

Q. Do you remember about how long it took him?

(Testimony of Helen A. Haisch.)

A. Well, it took several hours. I don't know. Two or three hours, I should say. I don't recall.

Q. It was a long period of time? It wasn't five minutes?

A. Oh, yes. Yes; much longer than that.

Q. Did the friend assist him in going through the file?

A. Yes, he did. He copied some of the information.

Q. And the two of them sat there in your presence and went through the file; is that it?

A. Yes, sir.

Q. Was Mrs. Huckaby there?

A. She came—I went to lunch, and she came and sat with him while I was at lunch.

Q. Now, Mrs. Haisch, will you open that file please. [11]

The Court: I think we will suspend at this time for the noon period.

Mr. Duncan: I have exceeded my minute and a half, judge.

The Court: Yes, your minute and a half was being extended; so we will give you plenty of time.

We will suspend at this time until 2:00 o'clock. Ladies and gentlemen, please keep in mind and observe the admonition heretofore given.

Is it satisfactory to counsel if I merely call the attention of the jury to the admonition rather than repeat it?

Mr. Barwick: Yes, your Honor; that is satisfactory.

(Testimony of Helen A. Haisch.)

The Court: Very well.

You are now excused until 2:00 o'clock. Recess at this time.

(Whereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. the same day.) [12]

Wednesday, November 13, 1957—2:00 P.M.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated.

The Court: Proceed.

Mr. Duncan: Will you take the stand again, Mrs. Haisch.

Direct Examination
(Continued)

By Mr. Duncan:

Q. Mrs. Haisch, I am now handing you again Government's Exhibit for Identification Number 1 which you previously identified as the selective service file of Carlin Venus. I ask you now, Mrs. Haisch, to open that file, if you will please, and see if you can locate this Order to Report for Induction which is dated October 28th of 1955.

A. Yes, I have it. Yes, I have it.

Q. Did you find it? A. Yes.

Q. Mrs. Haisch, was that copy there the original

(Testimony of Helen A. Haisch.)

or what? Would you tell us please, how an Order to Report for Induction is prepared. [13]

A. Well, it is prepared with the original and carbon copy. This is the carbon copy of the original.

Q. And do you remember in this case what was done with the original?

A. No. It was folded and placed in the envelope together with instructions and mailed to the registrant at this address typed on the order for induction.

Q. Did you mail it yourself?

A. Yes, I did. I remember it, because I initialed a board member's initial on the copy, the carbon copy.

Q. Your initial is "H. H." appearing on that carbon?

A. No, I initialed "J. L." only. The original order for induction is signed by a board member himself, so I initialed the board member's initial on this copy so that I would know the board member who had signed the original order.

Q. And you are the individual that placed the initials "J. L." on that copy, is that right?

A. Yes. Yes, I am.

Q. Now, Mrs. Haisch, this original order which was placed in the mail, have you ever seen it since that time? A. No, sir, I have not.

Q. What normally happens when you send an order out, and it is not received by the individual to whom it is directed?

A. It is returned to us by the post office marked

(Testimony of Helen A. Haisch.)

"Moved," or whatever the case might be—"Left no Address"—[14] but it is returned by the post office.

Q. And I take it that the original in this case was never returned to you by the post office?

A. No, sir.

Q. Now, I want to get back, Mrs. Haisch, to the day of April 25th of 1957. You testified that the defendant and one other individual came to the local board at that time and, in your presence, went over this file? A. Yes, that is correct.

Q. They went over the file that is Exhibit Number I for Identification, is that right?

A. Yes, sir. Yes, they did.

Q. And did you assist in that in any way, Mrs. Haisch? Did you point out any documents to either the defendant or the other person?

A. Yes. We went over it more or less together, and I did show him his Order to Report for Induction.

Q. You showed him that Order to Report for Induction? A. Yes.

Q. That copy, is that correct? A. Yes.

Q. That was on April the 25th of 1957?

A. I showed it to him, and I said, "This is the copy of the original mailed to you on this date and to the address written on the order." [15]

The Court: What is the date of that order?

The Witness: October the 28th, it was made, 1956. Is that right or—wait a minute.

Mr. Duncan: 1955, I believe.

(Testimony of Helen A. Haisch.)

The Witness: 1955, yes. I'm sorry. October 28, 1955, it was made.

The Court: The order to report, is that it? Is that the one that bore that date?

The Witness: Yes, sir.

The Court: October what?

The Witness: 28th, 1955.

The Court: That is the date of the order?

The Witness: The date the order was mailed.

The Court: The date of the mailing?

The Witness: Yes, sir.

Q. (By Mr. Duncan): As a matter of fact, that date appears right over the wording "Date of Mailing," doesn't it, Mrs. Haisch?

A. Yes. Yes, it does.

The Court: Did the order have a date written——

The Witness: For him to report?

The Court: Yes.

The Witness: Yes, sir. There is a mailing date on it and also a reporting date.

The Court: It is a duplicate of a form, is it? [16]

The Witness: Yes.

The Court: Of a formal order?

The Witness: Yes, sir. It reads: "Order to Report for Induction."

The Court: And what is the date of the order?

The Witness: The date of mailing?

The Court: No, the date of the order.

The Witness: Oh, for him to report?

(Testimony of Helen A. Haisch.)

The Court: No, the date the order is signed. Does that bear a date?

The Witness: October 28th, 1955.

The Court: When it was made?

The Witness: Is the date of mailing.

The Court: Does it have a date on the order when it was issued?

The Witness: Oh, you mean the form issuance? That is on the date the form was issued?

The Court: Yes.

The Witness: Yes, it is a Revised Form 1950.

The Court: That isn't what I mean.

The Witness: That isn't what you meant?

Mr. Duncan: Your Honor, I don't believe there is any other date than the date of mailing.

The Witness: And the date of reporting; that is right. [17]

The Court: This is a copy of the order that was mailed out?

The Witness: Yes, sir.

The Court: Do you have a record of where it was mailed to?

The Witness: Yes, sir.

Q. (By Mr. Duncan): Would you tell us please, the address to which it was mailed, Mrs. Haisch?

A. It was mailed to 1431—10th Street, Modesto, California.

Q. And would you tell us, please——

The Court: What street is that?

The Witness: Tenth. Tenth Street.

Q. (By Mr. Duncan): Would you tell us please

(Testimony of Helen A. Haisch.)

Mrs. Haisch, where it was that you got that address of 1431—10th Street?

A. From a letter received from the registrant.

Q. Was that within the file?

A. Yes, the letter is here.

Q. Would you see if you can find that letter please? A. Yes.

Mr. Barwick: John, can I help? I can tell her what number it is. It is number 141.

The Witness: Thank you.

Yes, the letter is here. And it was written June 7th, 1954. [18]

Q. (By Mr. Duncan): Would you read that letter to us please, Mrs. Haisch.

A. It is addressed to Local Board 140, Fox Theater Building, Room 205, 1215-7th Avenue, San Diego, California:

"Dear Ladies and Gentlemen:

"At this time I wish to inform you of my departure from San Diego to Modesto, California because of secular employment. The Federal Bureau of Investigation I have notified when in Los Angeles after induction proceedings. My new address is 1431-10th Street, Modesto, California. Same employee"—"same employer"—he has here—"but can be reached within one or two days at my San Diego address.

"Thanking all of you, remain

"Sincerely or respectfully,

"/s/ CARLIN VENUS."

(Testimony of Helen A. Haisch.)

Q. Do you know whether or not there is any letter in the file after that date, Mrs. Haisch, of June 7th, 1954, indicating a different address for the defendant?

A. Yes. Yes, I have other—since received changes of address for him.

The Court: Before we get to that: Now, what appeared on the mailing address, on the mailing envelope? What was on that envelope when it was mailed out?

The Witness: The address, the same address that is on the Order to Report for Induction.

The Court: The name?

The Witness: Yes, sir; the name and the same address.

The Court: Whose name? [19]

The Witness: Carlin Venus; Carlin Constantine Venus.

The Court: The same address. What else appears on there?

The Witness: The envelope?

The Court: The envelope.

The Witness: His name in full and his address, mailing address in Modesto.

The Court: Was there any return address?

The Witness: Oh, yes. Our selective service envelopes always have the return address.

The Court: What does it say?

The Witness: It says, "Return to Sender." And then there is a box, and we stamp the local board

(Testimony of Helen A. Haisch.)

stamp in that box, our name and address, our local board and office address.

The Court: That all appeared on the return envelope?

The Witness: Yes, sir.

The Court: Do you have a copy of that in the file?

The Witness: I don't believe we do.

The Court: Can we state exactly what was in the box that you say was stamped?

The Witness: The box?

The Court: Yes.

The Witness: It says: "Local Board 140, Fox Theater Building, Room 205, 1215-7th Avenue, San Diego 1, California." [20]

The Court: What else does it say on there in connection with the box?

The Witness: Above it I believe it says: "Return to Sender."

The Court: "Return to Sender?"

The Witness: Yes.

The Court: Then the address?

The Witness: Then, of course, up at the top it is "Official Business"—"Selective Service System Official Business."

The Court: Go ahead.

Q. (By Mr. Duncan): Mrs. Haisch, after June 7th, 1954, and before October 28th, 1955, did you receive any other letters indicating another address from the defendant?

A. Yes. Let's see. We received one on April 10, 1956.

(Testimony of Helen A. Haisch.)

Q. Is that the next letter you received, to your knowledge?

A. The change of address; yes, sir.

Q. Now, every letter and every bit of correspondence concerning a registrant goes in that file, doesn't it? A. Yes, it does.

Q. That is part of your job, to put those things in that file? A. Yes, sir.

Q. To the best of your knowledge, every document and [21] every letter concerning this defendant is in that file, isn't it? A. Yes, it is.

Mr. Duncan: I have nothing further.

Mr. Barwick: If the Court please, may I question the witness from the counsel table?

The Court: What is that?

Mr. Barwick: May I question the witness from the counsel table?

The Court: Oh, yes, go right ahead.

Cross-Examination

By Mr. Barwick:

Q. Mrs. Haisch, approximately, to the best of your knowledge, how many selective service registrants do you have in your files in your office?

A. In my local board?

Q. Yes.

A. Or you mean in the selective service office?

Q. No, in your local board that you have charge of? A. Oh, more than seventeen thousand.

The Court: More than what?

The Witness: Seventeen thousand.

(Testimony of Helen A. Haisch.)

The Court: Seventeen thousand?

The Witness: Yes, sir.

The Court: Would you keep your voice up please.

The Witness: Surely. [22]

The Court: These acoustics here are not very good, and it is difficult for me to hear. Although the people in the rear of the courtroom can hear, I can't.

The Witness: All right.

Q. (By Mr. Barwick): And you are personally the custodian of all those records?

A. Yes, I am. I am responsible for them.

Q. And is it your personal duty to mail out all the notices of any nature, or do you delegate some of your responsibilities to other clerks in the office?

A. Some of my work is done by others, yes.

Q. Now, when it comes to mailing out a classification card or an order to report, do you do that personally or do you delegate it, or both?

A. Well, I usually——

Mr. Duncan: I will object to that question, your Honor. We are only concerned with what happened here.

The Court: Only what?

Mr. Duncan: We are only concerned with what happened here.

The Court: You are asking about a custom?

Mr. Barwick: Yes, your Honor.

Mr. Duncan: I have no objection to counsel's showing the full picture of what happens at the local

(Testimony of Helen A. Haisch.)

board, but the witness has already testified that she is the one that sent [23] this order.

The Court: I take it he is testing the memory of this witness. She may answer.

The Witness: Will you please repeat the question.

Q. (By Mr. Barwick): Yes. Do you personally mail out all the notices of classification and orders to report, or do you delegate some of that specific responsibility to another clerk?

A. Well, some of the work is done by others, but the orders for induction, those I usually send out myself if I am in the office.

Q. And if you are not in the office, is it possible that someone else does it?

A. Yes, if I am not there.

Q. Is there any way to tell who did it in a specific case?

A. Yes; in this specific case there is a way to tell.

Q. And how is that?

A. Because I initialed the carbon copy of the order.

Q. Now, do you actually recall mailing this particular order?

A. Yes, I do, because I knew Mr. Venus, and I remembered mailing it.

Q. And do you have a regular mail box that you put all your mail in? A. Yes. [24]

Q. And on this occasion did you put this particular letter in that box?

A. I can't say that I put it in the mail box. I

(Testimony of Helen A. Haisch.)

put it in the box in our office, mail box in our office.

Q. Who picks the mail up from the mail box in your office?

A. Usually one of us clerks takes the mail over and puts it in the box before or at the close of business for the day.

Q. You have a specific receptacle in your office then where you put all your out-going mail?

A. Yes, that is correct.

Q. Who goes and gets the mail out of the receptacle?

A. One of the clerks puts the mail together, bundles it and puts a rubber band around it. The out-going mail, we put "Out of Town" on it, and the local, we put a local—little something that is furnished to us by the post office. And we put rubber bands around them. And one of the clerks is responsible for the mailing of all our mail.

Q. Then, in other words, you didn't actually mail this notice; you merely put it in the box within your office to be mailed?

A. Yes. I don't recall if I mailed it that day or not.

Q. In other words, some days you have the chore of collecting it out of the box and taking it over, and then on other days someone else might do it; is that correct? [25] A. That is correct.

Q. And on this particular day all you recall doing is putting it in the box within the office?

A. Yes.

(Testimony of Helen A. Haisch.)

Q. But that is not a government mail box; that is just——

A. Well, it is too, because we are a government office. So in a way it is a government mail box. We are responsible for it to see that it gets in the box.

Q. It is not a regular postal box from which a governmental employee would come and get mail out of it? A. No.

Q. When did you initial the order to report, the copy you have, which is part of the exhibit? When did you make that initialing?

A. After I had written out the order. And placing his order in the envelope, then I initialed the carbon copy.

Q. Then, in fact, a carbon copy could be initialed and never be mailed?

A. You mean the carbon copy never be mailed?

Q. No, the original.

A. The original? I doubt that.

Q. It could happen?

A. Oh, I suppose anything is possible, but——

Q. What I mean is the initialing takes place before it is mailed? [26]

A. The initialing is usually while I can see the order original to see who signed it. That is when I initialed it, so——

Q. So, the fact that the duplicate is initialed does not mean that you put it in the mail box?

A. No.

Q. It only means that you have prepared it? You

(Testimony of Helen A. Haisch.)

have addressed an envelope and put the original in the envelope? And then you initial the duplicate?

A. That is right.

Q. You don't have a duplicate copy of the envelope, do you?

A. No. Who would ever make a duplicate copy of an envelope?

Q. Well, you don't have one? A. No.

Q. Then, there is no way of knowing whether the envelope was properly addressed?

A. Well, if the order was properly addressed, then the envelope was properly addressed.

Q. And why do you reach that conclusion?

A. Because we have copied the address from the order on to the envelope.

Q. Is all your copy work always accurate even to a—— A. The boys get their mail. [27]

Q. Do you ever have letters come back that you misaddressed?

A. Probably. I don't recall any at the moment.

Q. In other words, the fact that 1431-10th Street appears on the original order that goes inside the envelope doesn't necessarily mean that 1431-10th Street appeared on the envelope itself?

A. I don't know that it does, but——

Q. In other words, it is two separate manual tasks: One, you could address the envelope 1431-10th Street—and that we can see; we have a copy—but the actual envelope itself you don't have a copy of?

The Court: She has already stated that.

The Witness: No, I don't have a copy of that,

(Testimony of Helen A. Haisch.)

but I was very careful to see that envelope was addressed properly. That, I recall.

Q. (By Mr. Barwick): I recognize the fact that you are very careful. I am not trying to impugn that you are not careful.

Directing your attention, Mrs. Haisch, to the Minute Cover—well, it is called Minutes of Action—you are familiar with that particular section?

A. Yes.

Q. And I believe it is Page 2, the second page, starting with "1-22-53." [28]

A. Yes, I have it.

Q. I notice after the item marked "1-22-53" you have got your initials "H. H."

A. That is correct.

Q. And for the next one, two, three items that you got there entered you have your initials marked "H. H." A. Yes, that is right.

Q. Then, after the item on May 4th there is no initial. A. That is correct.

Q. And on May 20th and May 26th and June 3rd there are no initials. A. That is correct.

Q. Then, the following items, numbering one, two, three, four, five, six in number, are all initialed.

A. Yes.

The Court: How is anybody to know what you are talking about?

Mr. Barwick: I have referred to the file, the page of the folder.

The Court: Has that been marked as an exhibit for identification?

(Testimony of Helen A. Haisch.)

Mr. Barwick: That is a photostatic copy she has got.

The Court: Well, the entire file has been marked, but is there some specific part of the file that you are alluding to now? [29]

Mr. Barwick: Yes.

The Court: Do you want to mark that specific file?

Mr. Barwick: It is called the Minutes of Action. It has a specific number.

The Court: I see. All right.

Q. (By Mr. Barwick): Now, after each one of those items you have your initials "H. H." When do you make this notation on this minute entry?

A. You mean when do I write these minutes?

Q. Yes.

A. Well, whenever any action is taken that requires the minutes be written on the back. Then I write them at the time.

Q. Then, at the actual time you do the thing that is referred to, you write it on the minute action?

A. Yes.

Q. And then you initial it?

A. Yes, in some instances.

Q. Pardon?

A. Yes, I initial them in some instances. I don't always initial them.

Q. In which instances do you initial them? Are there any specific ones?

A. Well, if I write it on the typewriter, ordinarily I do put my initials after them. However, if

(Testimony of Helen A. Haisch.)

I use a stamp— [30] we do have several different kinds of stamps in the office—then I do not initial them, because that would mean putting the cover sheet in the typewriter to put the initials on. And I do not initial it when I use a stamp.

Q. Directing your attention to June 3rd, 1954, entry, I find the initials "A. W. R." after that entry. A. That is "B." That is "A. W. B."

Q. "A. W. B.?" A. Yes.

Q. Is that some other clerk's initials?

A. No, that is a board member's initials.

Q. Directing your attention to "9-1-55" on the minute cover. There are some initials there. Do you know whose initials those are?

A. "J. L." That is a board member; Joseph Levikow.

Q. Then, ordinarily if a board member makes an entry, they initial it after the entry?

A. Yes. Yes, they do.

Q. Did Mr. Venus ever come into your office after October 28th, 1955, on any occasion other than that April 25th meeting?

A. Of '55, did you say?

Q. Yes. That was when he was sent the order to report.

A. I don't recall him coming into the office at any time except in April, and then since, I don't recall it. [31]

Q. Directing your attention to the letter that the defendant wrote you notifying you of the change of

(Testimony of Helen A. Haisch.)

address to Modesto, which is Item Number 21 in the file, the letter being dated June 7th, 1954.

A. Yes, I have it.

Q. Do you recall receiving that letter and reading it? A. Yes, I do.

Q. And do you recall, in addition to the fact that there is a Modesto address, that the last line of the letter reads: "* * * but can be reached within one or two days at my San Diego address?"

A. That is right. Yes, I remember it.

Q. Now, when you sent out the notice to report to Mr. Venus, you heard nothing from him; is that correct? A. That is correct.

Q. Did that puzzle you?

A. Well, yes it did; because I thought it strange that he had not reported for induction since he had been ordered to.

Q. Did you recall at that time this portion of the letter, that he could be reached at his San Diego address?

A. I saw no reason to use the San Diego address. He received the letter at the Modesto, California address; because it wasn't returned by the post office. So I saw no reason to use his San Diego [32] address.

Q. In other words, you assumed that by the fact that the letter didn't come back that he had received it and, therefore, there was no need to notify him at the San Diego address?

A. That is correct.

Q. Now, you are quite familiar with this regis-

(Testimony of Helen A. Haisch.)

trant's whole file? A. I believe so.

Q. And his history before the Board?

A. I believe so, yes.

Q. Would you characterize his attitude, his promptness in reporting or lack of it as good or bad?

A. Well——

Mr. Duncan: I will object to that, your Honor. That is incompetent——

The Court: Just a minute. Let me have that question.

(Question beginning with Line 11 and ending with Line 12, Page 33 reread.)

The Court: The objection is sustained.

Q. (By Mr. Barwick): According to the selective service file that you have before you, was Mr. Venus always prompt in notifying the Board of any change in his addresses?

The Court: That is argumentative. It is along the same line. The record will speak for itself whatever has been done. [33]

The Witness: I am not to answer that, am I?

The Court: Pardon?

The Witness: I am not to answer that, am I?

The Court: We will see in just a moment. We will see if the United States Attorney has anything to say about it.

Mr. Duncan: Are you finished, counsel?

The Court: I think that last question is in line with the previous question to which the objection was sustained. The record will speak for itself.

(Testimony of Helen A. Haisch.)

Mr. Barwick: All right, your Honor. I will withdraw the question.

Q. Directing your attention to the cover sheet of the registrant's file, how many changes of address do you find there?

Mr. Duncan: I will object to that, your Honor. The record can speak for itself. This record can speak for itself.

Mr. Barwick: If the Court please, it is going to be much easier for the jury to be told some of these things than have to go through a hundred and fifty pages of items to find out how many times he reported or changed his address. I am only trying to help get the facts in front of the jury. They can look at this all day and not discover some of these items.

The Court: Let me see this exhibit that you [34] are inquiring into.

Mr. Barwick: Here is a photostatic copy of it.

The Court: Yes.

You have reference to addresses previously changed, is that correct? Is that your question?

Mr. Barwick: And subsequent, your Honor.

The Court: Are there any subsequent to what has already been testified to?

Mr. Barwick: I believe the file shows that there are subsequent addresses after the Modesto that are listed in his folder that he sent in.

The Court: I see.

Mr. Barwick: There are also a large number of prior.

(Testimony of Helen A. Haisch.)

The Court: She may answer.

The Witness: Would you ask the question again please?

Q. (By Mr. Barwick): I believe it was phrased this way: In the cover sheet of this registrant's file how many changes of address do you find listed there? A. There are eight.

Q. Are any of those subsequent to the Order to Report for Induction? A. Yes.

Q. How many? A. Two.

Q. Directing your attention to this conversation on [35] April 25th, 1957, did you or did you not at that time tell the defendant, Mr. Venus, that the matter was out of your hands and was up to the United States Attorney?

Mr. Duncan: I will object to that as being irrelevant and immaterial.

The Court: The objection is sustained.

Q. (By Mr. Barwick): Did you at that time tell the defendant that he had a duty to report?

A. I don't recall.

The Court: The answer was?

The Witness: I don't recall.

Q. (By Mr. Barwick): Do you recall the defendant's asking you at that time, "What procedure do I follow now?" A. No.

Q. You just don't recall? A. No.

Q. Do you recall anything that the defendant asked you on that occasion? A. Certainly.

The Court: Just a minute. What about this line of questioning? She is a clerk in the office; she is not a board member.

(Testimony of Helen A. Haisch.)

Mr. Duncan: Well, I went into the April 25th meeting, your Honor. I suppose it is proper to bring out all the facts surrounding that meeting. [36]

The Court: Was this during a meeting, or was it just an informal visit you refer to?

Mr. Barwick: It is an informal visit, your Honor, but it bears highly on the question of his intent.

The Court: I beg your pardon?

Mr. Barwick: It bears quite strongly on the question of his intent.

The Court: April, 1957; that is this year, is that correct?

Mr. Barwick: Yes, your Honor.

The Court: Do you understand the question, ma'am?

The Witness: Yes. He wanted to know if I remembered anything the registrant said.

Is that what you said?

Q. (By Mr. Barwick): Yes.

A. Why, certainly I remember. He came into the office and asked if he could see his file, and I said absolutely he certainly could. So I asked him to come in, seated him at a desk, and got his file for him, and opened it open. And he started looking through it. We looked through it together and discussed it together. And he wanted to see his Order to Report for Induction. We got that out, and he reviewed all of it. And he also had a friend with him who helped him copy the information from the file. And I stayed with him while he copied it. [37]

(Testimony of Helen A. Haisch.)

Q. Now, that you have refreshed your memory by repeating it, do you recall anything, in substance, wherein he asked you, "What do I do?"

A. Why would he ask me a question like that?

Q. I don't know why.

A. I couldn't tell him what to do. I couldn't tell him what to do.

Q. I just want to know if he did.

A. No, I don't recall him asking me, "What do I do?"

Q. Did he ask you?

A. I don't recall him asking me that. I do recall something he said.

The Court: What is that?

The Witness: I said I do recall something he said, but probably that would be out of order.

Q. (By Mr. Barwick): No, anything he said would be in order if you can recall it.

A. Well, he did say that if he had gotten his Order to Report for Induction, of course, he would have refused induction.

Q. I see. A. He did say that.

Q. Do you recall during that conversation, being asked whether the Board had ever received a post card written by the defendant from Modesto and mailed to the Board showing a [38] change of address?

A. Yes, he asked the question. And I said if we had received the card, it would have been in the file.

Q. Then, you do remember something more than what you have just stated. You do remember that?

(Testimony of Helen A. Haisch.)

A. I remember that, yes.

Q. Do you recall the defendant's mentioning a letter that he had written in September of 1956, to the Board requesting that he be not considered delinquent? Did you have a discussion about that letter? A. I don't recall.

Q. I direct your attention in the file to September 4th, 1956, Item Number 26. A. Yes.

Q. Would you please read that letter to the jury.

Mr. Duncan: I will object to that, your Honor. That letter will speak for itself.

The defendant can call Mrs. Haisch as his own witness if he desires and go into this exhibit more particularly. I went, simply, into the happenings on April 25th of 1957, and this is exceeding the scope of the direct examination when he goes into another letter on an entirely different thing.

The Court: I would like to see the letter.

Mr. Barwick: This is a photostat.

The Court: Is this a copy of the letter? [39]

The Witness: Yes, sir. This is the original here; yes, sir.

The Court: I will take your letter.

The Witness: All right. Surely.

The Court: I am going to excuse the jury for a few minutes. You are excused for a few minutes. Please keep in mind the admonition.

(Whereupon the jury retired to the jury room, and the following proceedings were had outside the presence and hearing of the jury:)

(Testimony of Helen A. Haisch.)

The Court: Now, I want some information from counsel here. This file has been introduced.

Mr. Duncan: It hasn't been introduced yet, your Honor.

The Court: What is that?

Mr. Duncan: It hasn't been offered yet.

The Court: It has been referred to. And are you going to offer the entire file in evidence?

Mr. Duncan: I am still contemplating that, your Honor.

The Court: I want to know that before I can pass on this matter.

Mr. Duncan: I think I will offer the entire file, your Honor.

The Court: This is part of the file, is it not?

Mr. Duncan: Yes, it is part of the file, your Honor, [40] but the thing that I have an objection to is I referred on direct examination——

The Court: Can you come forward.

Mr. Duncan: I'm sorry. I beg your pardon.

I referred on direct examination to a conversation on April 25 of this year that the defendant had with the witness at the Board. Now, by referring to that conversation counsel then is attempting to have the witness read this letter in. Now, that is exceeding the scope of the direct examination, because he is emphasizing this letter; and the letter speaks for itself.

The Court: It seems to me this letter, reading it, is self-serving. He is talking about himself as to what he did, and he argues the matter somewhat. He

(Testimony of Helen A. Haisch.)

writes it to the local board. But if this entire file is going to be introduced, this is part of the file.

It is true parts of the file may not bear upon this subject matter, but here is a letter dated September 4, 1956. The notice that he is alleged to have ignored is dated——

Mr. Duncan: October 28, 1955.

The Court: ——1955.

Mr. Duncan: Eleven months before.

The Court: And the letter that he had previously sent in as to his change of address is dated June the 7th, 1954. Now, I don't know just what the scope ought to cover here [41] in this case.

Mr. Duncan: It has always been my impression, your Honor, that a letter should speak for itself. This letter, while it is a part of Government's Exhibit for Identification Number 1, there was no emphasis placed upon it on the direct examination. Now, this is a self-serving declaration. Nothing on direct examination referred to this letter. It should speak for itself. The jury should have the opportunity, your Honor, to review these letters and to place such emphasis on them as they desire, rather than having particular ones read to them.

I realize I had a letter read in. Perhaps it is not proper, but it went in without objection.

The Court: This, for example, says in here: "I have always complied with all the instructions of the Board. Never have I tried to avoid any duty by means of trickery." That is a gratuitous statement on his part. It is self-serving. "In other words,

(Testimony of Helen A. Haisch.)

therefore, I honestly object to your conclusion that I have been delinquent in advising the Board of my own matters. I concealed nothing and refused induction openly, because of being conscientiously opposed to combat and noncombatant service as an ordained minister, on May the 20th, 1954. I reported to the induction station because of receiving mail at my home address in San Diego. I definitely did not receive any other induction notice. And if I did, I would have [42] reported as before. After openly appearing at the marshal's office, I was put in jail on bail in August of '55, and my case was completely thrown out of court, as the case in the Supreme Court had been won that had bearing on my case * * *'' He argues the matter here, and he not only argues it but puts himself, by reason of that argument, in a favorable light.

I think all you are interested in is what the proceedings here concern.

Mr. Barwick: I will withdraw the letter if counsel will stipulate the file into evidence now.

Mr. Duncan: I am going to offer the whole file, your Honor. I just don't want emphasis placed on this particular letter, putting in the defendant's testimony during the government's case.

Mr. Barwick: That is right. I will withdraw it for that purpose if counsel will stipulate the file into evidence now.

The Court: But are you going to argue from the entire file at random? I don't know. It may have something to do with the previous case which we

(Testimony of Helen A. Haisch.)

have nothing to do with here at this time. It may have something to do with the war in China. I don't know.

Mr. Barwick: Naturally, I don't intend to spend any more time here arguing than is pertinent. And if we go through that file letter by letter determining what is and [43] isn't going to go in, we will be here a week.

The Court: The only thing we have before us in this case: Did he or did he not receive the letter? You have already developed the custom and the action in regards to the mailing of the letter. Now then, that would call for some burden or some explanation on the part of the defendant. There is a dispute about his having received the letter. There is in evidence the fact that he subsequently went into the office. There, that is correct, isn't it?

Mr. Duncan: Yes.

The Court: And discussed the matter with the witness and possibly others. He had a friend with him. The only material matters, I think, are in relation to these occurrences to determine what his intent was and knowledge in this matter. Now, if you go into another case that was thrown out, as he said, if you go into argumentative matters—the letter, for example, in which he attempted to give himself a good recommendation, in which he talks about trickery and all that, putting himself in a favorable light in relation to that portion of the letter—if you are going to go into all these matters, I am wondering just how far we should go.

(Testimony of Helen A. Haisch.)

Mr. Duncan: Your Honor, I intend to put the whole file into evidence, but I think the file should speak for itself, and that particular emphasis should not be put on any——

The Court: We don't want to divert the attention [44] of the jury here as to the issue at hand, the whole issue we have to determine: Did he or did he not receive the letter?

What was his state of mind in relation to this entire situation? So that the jury may have some knowledge as to either his prior or subsequent actions so as to determine his state of mind and determine his intent in relation to whether or not he desired to report for induction or not. Now, if you people can work out a formula to confine the evidence within proper bounds, we can probably make progress; but——

Mr. Duncan: This problem of putting in the whole selective service file is always raised in this type of case, and it has been the general procedure to do so; because it represents a true and fair picture to both sides. It gives the complete history of the whole case. And that is the reason, generally, defense counsel raises no objection to its going in; and the government wishes to have it in.

The Court: In a way, he makes a statement in this letter which is not in his best interest. That is not my affair to comment on that, but you are conducting the case, Mr. Duncan, and I am calling this to your attention so you can work out these problems from your point of view.

(Testimony of Helen A. Haisch.)

Mr. Duncan: I will at this time offer the complete file that has heretofore been identified as Government's Exhibit Number 1.

Mr. Barwick: I have no objection, your [45] Honor. I want it in. I will stipulate that it may be entered right now.

The Court: I may have something to say about that later on. This thing is going to take two weeks to try it. If you are going through every letter and cross-examine the witness on every document that is in the file, I am going to put a stop to it.

Mr. Barwick: I don't intend to, your Honor.

Mr. Duncan: The government doesn't intend to, either, your Honor. I think we will wind the case up in short order.

The Court: Very well.

The Clerk: The exhibit is marked Government's Number 1 in evidence then, your Honor?

The Court: It may be received in evidence subject, however, to further developments; and we will see whether there are some immaterial matters, immaterial to this situation, in the file.

Call back the jury.

Mr. Barwick: By that, does the Court mean to say it will exclude portions of the file later on?

The Court: Will what?

Mr. Barwick: Will exclude a portion of the evidence later on?

The Court: Will what?

Mr. Barwick: Exclude any portion of the [46] file.

(Testimony of Helen A. Haisch.)

The Court: I can't tell you what I might do. I don't know myself at this time. We will see. But the file is in evidence now.

(Government's Exhibit Number 1 for Identification was received in evidence as Government's Exhibit Number 1.)

(The proceedings were resumed within the presence and hearing of the jury:)

The Court: Do you now stipulate the jurors and the defendant are present?

Mr. Duncan: It is so stipulated.

Mr. Barwick: I so stipulate.

The Court: You may proceed.

Cross-Examination
(Continued)

By Mr. Barwick:

Q. Did you have a conversation on April 25, 1957, in your office with the defendant concerning a letter he had written to you on September 4, 1956?

A. I don't recall that letter in particular. We discussed several of the letters in his file, but I don't recall that one in particular.

Q. You don't recall discussing that particular letter?

A. No, not any more than some of the other information in here.

Q. Mrs. Haisch, do you recall the defendant's

(Testimony of Helen A. Haisch.)

asking [47] you a question, in substance, as follows: "Didn't it strike you as unusual that I didn't report?"

A. Yes, I remember him asking me that, and I said, yes, I thought it strange that he didn't report.

Q. And why did you give the answer "I thought it strange that you didn't report?"

A. Well, I thought he had received his order and that he would report.

Mr. Barwick: No further questions, your Honor.

Mr. Duncan: I have nothing further, your Honor.

The Court: That is all.

(Witness withdrew.)

The Court: That file may now be marked in evidence.

The Clerk: It is so marked.

(Government's Exhibit Number 1, Selective Service File, heretofore marked as Government's Exhibit Number 1 for Identification was then marked in evidence as Government's Exhibit Number 1.)

Mr. Duncan: The government rests, your Honor.

The Court: Do you have an opening statement at this time?

Mr. Barwick: Yes. If the Court please, I would like to make an opening statement.

The Court: Proceed.

(Whereupon followed an opening statement by defendant's counsel.) [48]

Mr. Barwick: At this time I would like to call he defendant to the stand, your Honor.

The Clerk: Will you be sworn.

CARLIN CONSTANTINE VENUS

he defendant, called as a witness in his own behalf, aving been first duly sworn, was examined and estified, as follows:

The Clerk: Be seated please. Please state your ame for the record.

The Witness: Carlin Constantine Venus, V e n u s, last name.

Direct Examination

By Mr. Barwick:

Q. And where do you live at the present time, Ir. Venus?

A. 302 Market Street, Venice, California.

Q. Directing your attention to 1954, in the fall f the year, where were you living at that time?

A. In Modesto, California; 1431-10th Street.

Q. And how long did you live at 1431-10th Street n Modesto?

A. From approximately June of 1954 to Decem- er, 1954.

Q. In June of 1954, where were you living prior o moving to Modesto?

Prior to moving to Modesto in June of 1954, where did you live?

(Testimony of Carlin Constantine Venus.)

A. 650-11th Street, San Diego. That was my parents' home address. [49]

Q. And have you notified the draft board that that was your address? A. Yes.

Q. And then, when you went to Modesto, did you notify the draft board of a new address?

A. Yes, I did.

Q. How did you notify them?

A. By mail; the letter of June 7th, 1954.

Q. Is that the letter that was read into evidence a short time ago? A. Yes.

Q. Did you ever leave Modesto after June, 1954?

A. I left from time to time, but I was always in close contact with the address within——

Q. What was the address at 1431-10th Street in Modesto? A. What was it?

Q. Yes. What was there?

A. It was a large building. It was a gymnasium.

Q. Did you work there? A. Yes, I did.

Q. Did you sleep there? A. Yes, I did.

Q. Did you receive mail there regularly?

A. Yes.

Q. When did you leave 1431-10th Street in Modesto? [50]

A. I left there around the fall of the year—the winter of the year of 1954. But I went back and forth to call to San Diego visiting my parents because of activity engaged in previous of this nature. And when I finally left Modesto to call, I helped my parents move in February of 1955. And then I notified them of this new address of my parents.

(Testimony of Carlin Constantine Venus.)

Q. Just a moment. Now, you left Modesto in February of 1955, is that right?

A. That was——

Q. That was the last time?

A. Yes, as far as address goes.

Q. Just before you left did you notify the board of a new address?

A. It was about the same time, because I didn't know if I was going to stay in Modesto or if I was going to stay in San Diego. So I, after helping my parents move, I decided that that would be the address. And then, after I had made sure of that, I had moved in February of 1955. That was my new address, and I notified the draft board of that address.

Q. Now, what address is that? What address did you notify them of in February, 1955?

A. 1120-30th Street in San Diego.

Q. And that was your parents' home?

A. Yes.

Q. And you weren't living there, though? [51]

A. At that time I was, because I was waiting for another case.

Q. You moved back from Modesto to San Diego and resumed residence with your parents at 1120-30th Street? A. Yes.

Q. In February of 1955?

A. That is right.

Q. How did you notify the draft board of that new address? A. By mail; post card.

Q. Did you address the post card?

A. Yes; I did.

(Testimony of Carlin Constantine Venus.)

Q. Did you put it in the mail box?

A. Yes.

Q. Did anyone see you put it in the mail box?

A. Yes.

Q. And what did the card say on it?

A. I said: "This is to notify you of my new home address. You can contact me at this address at all times. Please send all mail to this new address as from the date of February"—I believe it was February 20th. I am not accurate on that, but it was a February date. I said, "as of February 20th." I will say that. I would. "Please send all mail to this new address: 1120-30th Street, San Diego." And I signed it, my name: "Thank you, Carlin Venus." Then, I put my draft board number right on the bottom of 4140529 or 578. [52]

Q. When was the next time you heard from the draft board or any agency of the United States Government concerning your draft status?

A. Well, it wasn't until April of 1956, or the beginning of the year of 1956 one. An F. B. I. agent contacted me, and he said that I was delinquent. And I said, "What? Delinquent for what?" And he said, "Well, you haven't notified the draft board of your address." He said, "They have you charged with wilfully and knowingly refusing induction." And I said, "Well, I don't even know what you are talking about, because I would never refuse to report for induction." And he said, "Well"——

Mr. Duncan: I will object to any more conversation with the agent as hearsay, your Honor.

(Testimony of Carlin Constantine Venus.)

The Court: That is when? April of 1956?

Mr. Barwick: Yes, your Honor.

The Court: I will sustain that objection at this point.

Mr. Barwick: May I say something, your Honor?

The Court: Yes.

Mr. Barwick: We are not interested in the truth or veracity of what the agent said. We are only interested in what effect it had on him. We don't care whether all the words are true or not. So in that sense, it is not hearsay. We don't care whether it is true. It is only: Did he hear it? [53] And what was his reaction to it? So for that purpose alone what the agent said ought to be admissible.

Mr. Duncan: I will withdraw the objection, your Honor, if a proper foundation is laid for the conversation.

Mr. Barwick: All right.

Q. Where did this conversation take place with the F. B. I. agent?

A. In an establishment called Physical Services. It is physical therapy. It is a gymnasium.

Q. Where? A. In Los Angeles.

Q. Who was present during the conversation?

A. Well, the employer saw me talking to the F. B. I. agent, but he wasn't there; he was in another room.

Q. Do you remember who the F. B. I. agent was?

A. I remember him if I see him, but I can't remember his name.

Q. Was anyone else present?

(Testimony of Carlin Constantine Venus.)

A. No; not in that room.

Q. Do you recall what he said and what you said? A. Yes; not clearly.

Q. Would you repeat it to the best of your recollection?

A. He asked me if my name was Venus, and I said, "Yes." And he said that he was representing the federal government, and that he had been notified to notify me as a matter of [54] myself not reporting for induction. And I said, "Well, I don't know what you mean, because I have never received any notice to report for induction." He says, "Well, obviously then there is something about your address. Maybe you didn't notify the draft board, or there is something in that connection that took place or didn't take place." And, as the conversation went, I said that I definitely would have reported if I would have received an induction notice, but I didn't. And I told him that I did at that time—I told him I mailed a card to the draft board of the 1120-30th Street address in February of 1955.

He said that a notice, a card, was sent to me and a notice in September or October of 1955. "Well," I said, "at that time I wasn't even at that address. So if it was sent then, I couldn't have received it, because I wasn't there." And he said, "Well, it's not a matter for me." He said, "You had better notify your draft board." And that is what I did.

Q. How did you notify your draft board?

A. I wrote them a letter, and I told them of my new address. I told them of the address at that

(Testimony of Carlin Constantine Venus.)

time, and then my new address was 756 Pier Avenue. And I informed them of that. That was in 1956.

Q. Did you leave a forwarding address when you left Modesto? A. No; I didn't. [55]

Q. Why didn't you leave a forwarding address?

A. Because the main people I was in contact with knew of my whereabouts. And, as far as the draft board was concerned, I knew they knew of my address. And when I moved, I notified the draft board of my new address.

Q. That is the card that you mailed to them?

A. Yes.

Q. Was there any other way that they knew of your address?

A. No. They might have been able to contact my parents' address, my parents' previous address, if they didn't have that address, of 1431-10th Street. They say that they sent the notice. Now, if the notice was sent to the Modesto address in 1955, October, 1955, they sent it to the wrong address, because I wasn't living at that address. I was living at 1120-30th Street, San Diego, as of February, 1955. Not only that, as you mentioned, the building wasn't even there.

Mr. Barwick: No. No. Just strike that as nonresponsive, your Honor.

The Court: What do you want stricken?

Mr. Barwick: The last portion about the building not being there.

The Court: It may be stricken.

(Testimony of Carlin Constantine Venus.)

Q. (By Mr. Barwick): Directing your attention to April 25, 1957, did you go to the local draft board's office? A. Yes. [56]

Q. Was that the first time you went to the draft board after finding out that you had been reported delinquent? A. Yes.

Q. Why did you go to the draft board at that time?

A. Well, because of after writing back and forth —I wrote to the Board, and I told them of this, of my status, and so on. I thought that they would consider sending me another induction notice, because I didn't get it. I honestly felt that I deserved to get another notice. But because I didn't, I went to the draft board to review my file; because here the thing had already gone into other hands.

Q. How did you know that things had gone into other hands?

A. I had talked to an attorney about it.

Q. What other hands do you refer to?

A. Well, possibly the—I didn't know actually. Maybe the District Attorney or some—or the United States Attorney.

Q. You went to the draft board. Did you have a conversation on April 25 with Mrs. Haisch?

A. Yes; I did.

Q. And did you take anyone with you?

A. Yes; I did.

Q. And who did you take with you?

A. Bill McManis.

Q. Was he there at all times during your con-

(Testimony of Carlin Constantine Venus.)

versation with Mrs. Haisch? [57] A. Yes.

Q. And did you go there for any specific purpose? A. Yes; I did.

Q. What was that purpose?

A. To copy the file.

Q. And did anyone tell you to copy the file?

A. A friend of mine did, yes.

Q. You had a conversation with Mrs. Haisch. Do you recall what you said and what Mrs. Haisch said during that conversation? A. Yes.

Q. Would you please repeat, as fully as you can remember, what was said during that conversation?

A. Well, I went into the office, and I was immediately shown in because of procedure there. And I asked to see my file, and she said that was all right. And I said I would like to have my friend copy my file with me, and she said, "Well, you will have to sign a statement allowing him to do so." And I said, "That is all right." So I went in, and he went in with me. We had two typewriters, and we tried to copy everything as of January, 1955, because of this, whatever it is termed. And then, from that time on Mrs. Haisch and myself, we were discussing, we were reviewing the file. And I asked her, I said, "Didn't you think it strange that I didn't report, since I have reported and been completely [58] co-operative for four or five years?" And she said, "Yes, I thought it very strange, because you have been very co-operative." And the conversation went on, and I referred to the letter that I had written speaking about my address in

(Testimony of Carlin Constantine Venus.)

San Diego. And she said, "Well, we didn't get the induction notice back, so we automatically figured that you got it. And so we went through with the proper procedure, because we assumed that you had gotten it." Now, she said, "Whether you got it or not we don't know, but we assume that you did." And I said, "Well, I did not get it, and it certainly is, you know, quite a bit of difficulty that it is bringing up because of something that I am not even responsible for as far as it is actually a fact." And she mentioned, "Well, we usually file everything accurately and try to do our best." And I agreed with that. I wasn't trying to mention that she didn't mail it or anything. But as we discussed it, I said, "Well, what is the possibility of this, then?" And she mentioned, "Well, perhaps it is a postal mistake."

Q. Did you ask her at any time during that conversation, "What do I do now," or "Where do I stand," or did you ask her for any advice as to what you ought to do?

Mr. Duncan: I will object to that as leading.

The Court: It is leading. The objection is sustained.

Q. (By Mr. Barwick): Do you recall any further conversation at that time with Mrs. [59] Haisch?

A. We said many things, but I don't remember everything about it. I just remember the main highlights of it, naturally.

(Testimony of Carlin Constantine Venus.)

Q. Did she give you any advice?

Mr. Duncan: I will object to that as calling for a conclusion of the witness, your Honor. What was said is the thing in issue, not the——

The Court: The objection is sustained.

The Witness: What was said was that it is not in our hands anymore. And I said——

Q. (By Mr. Barwick): Who said that?

A. Mrs. Haisch.

Q. Was that in response to a question by you?

A. Yes.

Q. What was the question?

A. "Can I appeal this or anything now?" And she mentioned that it is not in their hands anymore, because it is in—either—I don't remember if she said District Attorney or United States Attorney. But she mentioned it was not in their jurisdiction anymore.

Q. Did she offer any solution?

Mr. Duncan: I will object to that, your Honor, as calling for a conclusion.

The Court: That objection is sustained and as to questions along that line. It has been established she hasn't the authority to give advice or offer solutions, and all. [60]

Mr. Barwick: That is a point, your Honor. She may not have had the authority, and she may have given it, and he relied on it.

The Court: I will sustain the objection.

Q. (By Mr. Barwick): Has anyone in any posi-

(Testimony of Carlin Constantine Venus.)

tion in the United States Government, to your knowledge, told you directly that you should report for induction? A. No.

Q. Has anyone in the United States Government prior to the indictment in this case told you or informed you that you might have a duty to report for induction even though you did not actually receive a notice?

Mr. Duncan: I will object to that as leading.

Mr. Barwick: It calls for a yes or no answer.

Mr. Duncan: It is direct examination, your Honor. We are not interested in counsel's testimony; we are interested in that of the witness.

The Court: Don't the regulations and laws require all these things without any specific notice? I am asking you now.

Mr. Barwick: Your Honor, it requires specific notice, but I want to——

The Court: I mean without additional formalities when a situation arises such as we have discussed here? Is there anything necessary other than the written forms that are sent out? [61]

Mr. Barwick: This question is asked in connection with his intent, your Honor, to show what his intent was. In other words, if someone had told him to go, even though it was wrong——

The Court: This doesn't depend on a verbal notice; it depends on a written notice.

Mr. Barwick: True, the——

The Court: And the records are on file. So what somebody else might have told him cannot be con-

(Testimony of Carlin Constantine Venus.)

sidered. We don't know who you mean by "any officer of the United States Government." If it is a question of knowledge or intent, he can testify what is in his mind on those matters. But I think when you go into a question of that kind, unless you show me that it is incumbent upon the government to give him verbal notice in addition to written notice——

Mr. Barwick: No, it is not.

The Court: ——then I would sustain the objection.

Q. (By Mr. Barwick): At all times during your selective service career, Mr. Venus, from the moment you first registered up to the present time, what has been your intent in connection with fulfilling any order received by you to report for induction?

Mr. Duncan: I will object to that as invading the province of the jury, your Honor. That goes to the ultimate issue in this case. That is a matter for the jury and not to be defined by the [62] witness.

The Court: It seems to me that he would have a right to——

Mr. Duncan: Well, the question is also leading, your Honor. I beg your pardon.

The Court: Go ahead.

Mr. Duncan: I think the question is leading, and it invades the province of the jury. Perhaps the same thing can be reached by a different type ques-

(Testimony of Carlin Constantine Venus.)

tion. But I think that question is clearly leading and invades the province of the jury.

The Court: After all, his intent is at issue here.

Mr. Duncan: It is the ultimate issue, your Honor, to be determined by the jury.

The Court: And, of course, the jury has a right to draw its own conclusions; but I think he would have the right to express himself in the light of his actions in this case.

Now, I would confine it to the matter at issue here instead of going into all his experiences, because, I don't know, it may relate back ten years or more.

Mr. Barwick: I did confine the question to Orders to Report for Induction, your Honor.

Mr. Duncan: I think the question can be more properly phrased, your Honor. It is vague and uncertain.

The Court: Reframe your question. [63]

Q. (By Mr. Barwick): Mr. Venus, have you formed any intent concerning what you would or wouldn't do if you received an order to report?

A. No.

Q. Did you have an intent if you got an order?

A. Yes; I would have reported if I——

Q. Did you have an intent? Yes or No?

A. To report?

Q. No; just did you have some thoughts on the subject? Would you do something when you got an order? A. Yes.

Q. Now, what would you do if you got an order?

(Testimony of Carlin Constantine Venus.)

A. I would report.

Mr. Duncan: It is all hypothetical and speculative, your Honor.

The Court: The answer may stand. As I say, it is a province of the jury. After all, he is just a witness the same as any other witness. The jury will be instructed what the law is on that subject matter.

Q. (By Mr. Barwick): Has it ever been your intent to wilfully and knowingly fail to report if you received an order? A. No.

Q. Have you always stood ready to report for induction if you received a notice? [64]

A. Yes.

Q. Have you ever, in fact, reported for induction? A. Yes.

Q. When did you report for induction?

A. May, 1954.

Mr. Barwick: No further questions, your Honor, at this time.

The Court: We will take a recess at this time. Again, I remind you of the admonition, ladies and gentlemen, you will please observe. We will recess for fifteen minutes.

(Recess taken.)

The Court: Do you stipulate the jurors and the defendant are present?

Mr. Barwick: It is so stipulated.

Mr. Duncan: It is so stipulated.

The Court: I don't see the defendant.

Mr. Barwick: He is on the stand.

(Testimony of Carlin Constantine Venus.)

Mr. Duncan: He is on the stand, your Honor.

The Court: Oh, there he is. I didn't look in that direction. Go right ahead.

Cross-Examination

By Mr. Duncan:

Q. Mr. Venus, you testified that in February, I believe of 1955, you notified the draft board here of your address being 1120-30th Street in San Diego; is that correct? [65] A. Yes, sir.

Q. What means did you use to notify the draft board of that?

A. I mailed them a post card.

Q. And that post card was mailed where?

A. It was mailed from a Los Angeles post office.

Q. Did you send it by registered mail?

A. No; I didn't.

Q. You said that somebody else was with you, however, when you mailed it; is that correct?

A. Yes.

Q. You also, on June 7, I believe, 1954, sent a change of address to the draft board giving them the Modesto address, didn't you? A. Yes.

Q. By what means did you send that address?

A. Sent it by means of a letter.

Q. And where did you mail that?

A. I mailed that from Modesto.

Q. And you sent that one by registered mail, didn't you?

A. I am not sure. I don't remember if I did or not.

(Testimony of Carlin Constantine Venus.)

Q. I will ask you to look through the exhibit here, Government's Exhibit 1, and see if you can find that letter that you wrote and dated June 7, 1954.

Can you find that? [66] A. Yes.

Q. Didn't you ask for a return receipt for registered mail when you sent that change of address?

A. Yes; I guess I did on this one.

Q. The envelope is attached, isn't it?

A. Yes.

Q. You also sent the draft board, did you not, a change of address in September of 1956?

The Court: Are all those exhibits numbered?

Mr. Duncan: They are all in Exhibit Number 1, your Honor.

The Court: I know, but are the pages separately numbered?

Mr. Duncan: Your Honor, there are about three numbers on each one of those pages.

The Court: I am just wondering if any of these exhibits that you take out now have any particular place in that file?

Mr. Barwick: Yes; they do, your Honor. If the Court please, each exhibit is numbered either in ink or pencil from 1——

The Court: I think they ought to be kept in order. You had better take this file and hand him the exhibits as you want him to identify them.

Mr. Duncan: All right, your Honor. [67]

The Court: That one you took out you put on top there, did you?

(Testimony of Carlin Constantine Venus.)

The Witness: Yes, sir.

Mr. Duncan: I would like to have Mrs. Haisch assist me here, if I may, your Honor, at the counsel table. Is that all right?

The Court: Yes; do that.

Mr. Duncan: Will you come forward, Mrs. Haisch?

The Court: I notice that you have copies, so that we can keep all these copies and everything in order, the original file in conformity with the copies.

Mr. Duncan: It is a letter dated September 4, I believe, Mrs. Haisch?

Mrs. Haisch: Yes.

Q. (By Mr. Duncan): And I show you now, Mr. Venus, a letter dated September 4, purporting to bear your signature as well as the envelope that is attached thereto. Now, that was sent certified mail with return receipt requested, was it not?

A. Yes.

Q. In other words, in June of 1954, you requested a return receipt and again in September of 1956, you requested a return receipt, but there was no return receipt requested in February of 1955; is that right? A. That is right. [68]

Q. Can you explain that?

A. Yes. I had no need to. As far as I was concerned, I was just dropping the draft board a line to let them know of my new address. It was only about a short ways away from one address to the other, from the previous San Diego address to the new San Diego address.

(Testimony of Carlin Constantine Venus.)

Q. Why is it in June of 1954, and again in September of 1956, you requested a return receipt?

A. At that time I had reported for induction, May, 1954, and then I noticed that the possibility of, or the necessity of, getting a return receipt for the address. Then, I, on the other one, I did the same thing. But on the one in February, 1955, I didn't have to. I mean, I didn't feel that it was necessary for me to do so.

Q. You thought it was necessary in June of 1954, and you thought it was necessary in September of 1956, but it wasn't necessary in February of 1955?

A. Well, that is the—I didn't—I wasn't—that didn't cross my mind at that time.

Q. You are aware of the fact, are you not, Mr. Venus, that the draft board file does not contain the change of address that was sent in February of 1955, are you not? A. Yes.

The Court: You may be seated. You can sit down.

Mrs. Haisch: Thank you. [69]

Q. (By Mr. Duncan): Mr. Venus, you said that you reported for induction in May of 1954. Were you inducted? A. No; I wasn't.

Q. Why not?

A. Because I am an ordained minister, and I refused induction openly.

Q. In 1954? A. Yes.

Q. And then, in June of 1954, after that, you sent a change of address to the draft board and

(Testimony of Carlin Constantine Venus.)

requested a return receipt, right? A. Yes.

Q. When were you first aware of the fact, Mr. Venus, that you had been ordered to report for induction on November 8 of 1955?

A. First time I heard of it was when the F. B. I. agent contacted me. I had not heard of it before that time.

Q. And that was in April of 1956, was it not?

A. Approximately, yes.

Q. And you knew at that time that you had been ordered to report for induction, did you not?

A. Yes, but the agent notified me to inform the draft board.

Q. Have you at any time since the day of November 8, 1955, presented yourself for induction at an induction station? [70]

Mr. Barwick: Objection, your Honor.

The Witness: No.

Mr. Barwick: It is irrelevant, and immaterial whether——

Mr. Duncan: That is the issue in the case, your Honor.

The Court: The objection is overruled.

Q. (By Mr. Duncan): You may answer the question. A. No.

Q. So you were advised then in April of 1956, that you had been ordered to report for induction.

When is the next time you went into your draft board?

A. Well, I wrote the draft board right away, and I thought that, because I didn't receive any

(Testimony of Carlin Constantine Venus.)

induction notice, that they would send me another induction notice, if anything, and then I could appeal that. Or I didn't even receive a 1-A Classification, let alone an induction notice. But after not hearing from the board—I had written them, and then I had gotten a letter from another office. It might have been the United States Attorney or District Attorney, I am not sure, and it said there is a certain matter of delinquency of you not reporting the address, and so on.

Q. Just answer the question. Now, Mr. Venus, you found out you had been inducted in November. You found that out in April of 1956?

A. Yes. [71]

Q. The next time you went to your draft board was a year later, in April, 1957, wasn't it?

A. According to instructions that the F. B. I. agent gave me, that is right.

Q. He told you to go to your draft board a year later?

A. He told me to write to the draft board, and that is what I did.

Q. When did you write that letter?

A. I wrote it in April of 1956. It was right after he talked to me.

Q. You did appear, did you not, in April of 1957 at the local board, didn't you? A. Yes.

Q. And at that time you went entirely through your selective service file, didn't you? A. Yes.

Q. And Mrs. Haisch pointed out to you the Order to Report for Induction, did she not?

(Testimony of Carlin Constantine Venus.)

A. Yes.

Q. And at that time you saw that Order to Report for Induction, did you not?

A. Yes, but I didn't know that I was supposed to. I didn't know that was the procedure.

Q. This notice, change of address, Mr. Venus, that you sent in February of 1955, you sent that from Los Angeles, [72] I believe you said?

A. Yes.

Q. And you said that somebody was with you when you mailed it? A. Yes.

Q. Did he go with you to the mail box?

A. He was there in the post office, and I believe he saw me mail it.

Q. Did you have him read it? A. No.

Q. And he doesn't know for sure what you sent, does he? A. I don't know exactly.

Q. You didn't have him read this post card you sent to the draft board?

A. No. No; because at that time it wasn't in issue like it is now.

Q. To your knowledge, you are the only one that has ever seen this post card with the change of address that you sent in 1955?

A. Would you repeat the question, please?

Q. To your knowledge then, you are the only one that has ever seen this post card that you sent to the draft board in February of 1955?

A. No; I would not say I am the only one that has seen the post card. I might say I am the—— [73]

Q. Well, the completed post card.

(Testimony of Carlin Constantine Venus.)

Now, you have said, Mr. Venus, that at some time you had talked to an attorney. When was that?

A. I called him on the phone, an attorney, and asked him about the F. B. I., told him about the F. B. I.

Q. I didn't ask you that. I asked you when it was, Mr. Venus? A. When?

Q. Yes.

A. It was right at the moment that the F. B. I. agent talked to me, right after that.

Q. Was it an attorney in Los Angeles?

A. Yes.

Q. Or one down here?

A. Yes. His name was Berlin.

Q. Mr. Berlin there in Beverly Hills?

A. Yes.

Q. Did you just talk to him on the telephone?

A. Yes.

Q. That was in April of 1956 that you talked to an attorney?

A. (No audible response.)

Q. Now, this building in Modesto, this 1431-10th Street, you say that is a gymnasium?

A. Yes; it was. [74]

Q. You worked there? A. Yes; I did.

Q. What kind of work did you do there?

A. Physical instructing and massage.

Q. You say the building is no longer there?

A. That is what I recently learned, yes.

Q. But the last time you were in Modesto it was there, wasn't it? A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. And when was that?

A. February, 1955.

Q. February, 1955?

A. Yes. I had gone back either January or February; I am not exactly——

Q. The building was standing at that time?

A. Yes.

Q. And you are sure that the address there was 1431-10th Street? A. Yes.

Q. I want to get this clear now, Mr. Venus; you didn't learn that you had been ordered for induction until April of 1956?

A. Yes; I believe that is right. I am not sure day to day, but it was a long time after they had said they sent the induction notice, that the F. B. I. agent contacted me. [75]

Q. You don't remember the name of the F. B. I. agent that contacted you? A. No; I don't.

Q. It wasn't Bill Scruggs? A. Pardon?

Q. Bill Scruggs?

A. Scruggs. I am not sure.

The Court: Can you describe the man, how he looked, what he looked like?

The Witness: He was a pleasant-looking man. He was about six foot, I would say; weighed about 190 pounds, maybe 185.

Q. (By Mr. Duncan): A ruddy complexioned man? Mr. Sayers, by any chance?

A. I can't—well, his face was—he had a fair complexion. He didn't have a ruddy complexion, the man that I talked to.

(Testimony of Carlin Constantine Venus.)

Mr. Duncan: I have nothing further.

Mr. Barwick: I have a couple of questions, your Honor.

The Court: Yes.

Redirect Examination

By Mr. Barwick:

Q. This conversation that you had with an attorney in Beverly Hills in April of 1956—— [76]

A. Yes.

Q. ——who was present during that conversation? A. Myself.

Q. Or was it over the telephone? A. Me.

Q. On the telephone or in his office?

A. I was on the telephone.

Q. And what did you ask him?

A. I just—he had been working for a previous attorney that I had hired, and the other attorney had retired; so he was there in the office. I asked him what should I do about this induction they say they sent, that the draft board said they had sent me? I told him about myself notifying the Board, and so on; and he said, well, as far as he knows, he said, the best thing to do is to check your file and see what actually has gone on and go from there. He didn't give me, tell me what to do and, actually, what not to do. He gave me suggestions, and so I went on from there.

Q. And did you write the draft board immediately thereafter? A. Pardon?

(Testimony of Carlin Constantine Venus.)

Q. Did you write the draft board immediately thereafter? A. Yes.

Mr. Barwick: Is the file there?

Mr. Duncan: I have it here, your Honor. [77]

Mr. Barwick: Actually, that copy is good enough.

Q. Directing your attention to Item Number 32 in your draft file, is that the letter that you wrote to your draft board after talking to the F. B. I. agent?

A. Yes.

May I say something else?

The Court: You have answered the question.

Q. (By Mr. Barwick): Did you receive a reply to that letter?

A. No; I didn't get a direct reply from the draft board.

Mr. Barwick: If the Court please, could I confer with the other counsel before I ask my next question?

The Court: Surely.

Mr. Barwick: John, would you come over here a minute?

(Off the record discussion between counsel.)

Q. (By Mr. Barwick): When you received no further direct response to your letter, did you write the draft board again? A. Yes; I did.

Q. And when is the next time you wrote them?

A. I believe it is September, 1956.

Q. After the alleged notice to report was sent, did you ever lose your draft card? A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. Did you write the Board for another [78] card? A. Yes.

Q. Did they send it to you? A. Yes.

Mr. Duncan: The cross-examination is being exceeded now, your Honor. I assume that this is redirect?

Mr. Barwick: It is redirect.

The Court: All right. Go ahead.

Q. (By Mr. Barwick): Did your Board inform you by mail at any time after you talked to the F. B. I. agent about reporting for induction?

Mr. Duncan: That calls for a conclusion of the witness, I believe, your Honor. I think the file is going to have to speak for itself.

The Court: You are inquiring about a notice, whether he received a notice?

Mr. Barwick: Yes; whether he received the notice from the Board in writing after the original notice.

The Court: Assuming that a notice was sent. Is that what you are driving at?

Mr. Barwick: I am not assuming anything. I am just asking him if he ever got one.

The Court: Any communication?

Mr. Barwick: Any communication relative——

The Court: You may ask that question.

Q. (By Mr. Barwick): Did you receive any communication [79] after this first order was supposed to have been sent? A. No.

Q. To the best of your knowledge, did the draft

(Testimony of Carlin Constantine Venus.)

board try to reach you at your local San Diego residence that you mentioned in your letter?

A. No.

Mr. Duncan: I will object to the manner in which that question is phrased, your Honor. I think it could be asked: Did he receive any mail from them, without——

The Court: The objection is sustained.

How would he know if the draft board ever tried to reach him?

Mr. Barwick: That is what we want to find out, your Honor, if he does know.

The Court: How would he know that they tried to reach him? He said he had no communication from the draft board.

Mr. Barwick: I am talking about any type of communication to his home. They could pick up a phone and call him. I want to know if that took place.

The Court: Ask your question over again that you have in mind.

Q. (By Mr. Barwick): Did the draft board at any time subsequent to October 28, 1955, to your own knowledge, contact you at your San Diego address? [80] A. No.

Q. You ordinarily receive phone calls at that San Diego address? A. Yes.

Q. At that time? A. Yes.

Q. Did you receive other correspondence at that address? A. Yes.

(Testimony of Carlin Constantine Venus.)

Q. And you had no communication from the draft board?

The Court: Just a moment. You are continuing with that course of examination. Is it on the theory that there was some obligation on the part of the draft board to communicate with the witness?

Mr. Barwick: Yes; there is, your Honor. There is, your Honor. Under the regulations the draft board has a duty, if they have any other way of finding a delinquent, to pursue it and notify the delinquent.

The Court: Let's see that regulation.

Mr. Barwick: I don't have a complete copy of the regulations. I can give you the number.

The Court: Let's see it.

Mr. Barwick: Regulation 1642.41, sub (a) and sub (b), and——

The Court: 1642. What else?

Mr. Barwick: .41. [81]

The Court: .41.

Mr. Barwick: Sub (a) and (b).

The Court: Sub (a) and (b).

Mr. Barwick: And I believe there are a couple more right next to it, but I didn't write down all the rest of the citations.

The Court: These regulations impose a duty of some kind on the draft board?

Mr. Barwick: Yes.

The Court: Let's see the regulation.

Mr. Barwick: I don't have the regulations in

(Testimony of Carlin Constantine Venus.)

writing, your Honor. Mr. Duncan has a complete copy of the regulations in his office.

Mr. Duncan: I think it is a matter of proper instruction, your Honor. I intend to submit instructions predicated upon regulations. It is 32 CFR, incidentally.

The Court: The counsel has asked the question assuming the state of fact to exist. Now, I don't know. You have objected to the question, haven't you? Or have you?

Mr. Duncan: I don't believe I had interposed an objection to that particular question, your Honor. I would like it restated or read back.

The Court: You would like what?

Mr. Duncan: I would like it read back, if the Court please. [82]

The Court: You want the question read back?

Mr. Duncan: Yes, please.

The Court: Let's have the question.

(The question beginning and ending on Line 9, Page 81, was read by the reporter.)

The Court: I think he already answered that before; he had no communication whatsoever.

Mr. Barwick: Yes; that was when you asked whether——

The Court: He had answered that then?

Mr. Barwick: Yes.

The Court: Then I asked you if there was some regulation requiring it?

Mr. Barwick: Right.

(Testimony of Carlin Constantine Venus.)

The Court: Then that is nothing for him to answer?

Mr. Barwick: No.

The Court: That is a legal matter that I want to look into.

Mr. Barwick: No further questions.

Recross-Examination

By Mr. Duncan:

Q. Mr. Venus, I show you a letter dated April 9, 1956, and purporting to bear your signature. Is that the letter you wrote to the draft board after the F. B. I. agent contacted you? A. Yes.

Q. This is the only one you wrote after the [83] F. B. I. agent contacted you?

A. I think this is the first one I wrote.

Q. And would you look at the envelope on that letter, please? A. Yes.

Q. How was that sent?

A. That is Special Delivery, and it is air mail. This is——

Q. You also wrote a letter?

The Court: Just a moment. You asked him a question, didn't you?

Mr. Duncan: I beg your pardon.

The Court: I didn't hear the answer.

The Witness: I said yes, this was the letter; and he asked me if it was——

The Court: A little louder, please.

The Witness: He asked me how it was stamped,

(Testimony of Carlin Constantine Venus.)

and I said it was marked "Special Delivery" and "Air Mail." This was after I had moved to Santa Monica, California.

Q. (By Mr. Duncan): You, on November 14 of 1956, also advised the draft board, did you not, of a change of address? A. November 14, 1956?

Q. Yes. I will show you this letter. Perhaps it will refresh your memory. This is just a copy.

A. Yes; that is right. I was thinking in the past.

Q. And this is the envelope here, or a copy of the [84] envelope, in which the letter was sent?

A. I believe it is, yes.

Q. That is sent by certified mail, is it not?

A. Yes. I will tell you why, if you would like to know.

Q. Let's see. That is November of 1956, September of 1956, and June of 1954, you used certified or registered mail to send in a change of address; is that right? A. Yes.

Q. But not in February of 1955?

A. That is right, because there are about five other cards in there to the same effect. They were not registered, or even possibly ten.

Q. Mr. Venus, I have no objection if you want to show us those that were sent by some other method than registered mail.

A. Well, they are in the file, I believe, in the——

Q. How many of them are there, would you say?

A. I would say there are about five. There are probably five cards similar to the one I sent, either notifying the Board I was going to be at a new

(Testimony of Carlin Constantine Venus.)

address, or something to that effect, anything in connection with procedures, because I never tried to run away from anything.

Mr. Duncan: That is all. I have nothing more.

Mr. Barwick: No further questions, your Honor.

The Court: Is that all?

Mr. Barwick: That is all.

The Court: Is that all? [85]

The Witness: Would you like these?

Mr. Barwick: Yes; they belong in the file.

Mr. Duncan: I beg your pardon, your Honor, I would like to ask the defendant one further question, if I may. I am sorry.

Q. You were represented, were you not, Mr. Venus, by an attorney in 1954, on a selective service matter? A. Yes.

Q. Who was that attorney?

A. Harold Shircliffe, Los Angeles.

Q. And it was a case similar to this one, but on a different transaction; is that correct?

A. Not similar to this one.

Q. It involved, shall we say, the selective service laws? A. Yes.

Q. And that man represented you for how long a period?

A. I am not sure. From 1954, I believe, in December, January, 1955; somewhere around that area, around that time.

Q. He represented you then for two or three months? Were you in contact with him?

A. Well, up to the time of August, 1955, when

(Testimony of Carlin Constantine Venus.)

the Supreme Court ruled that the case would be thrown out of court.

Q. Then you were in contact with this attorney for a [86] period of six months and in the early part of 1955? A. Yes.

Q. And had the advice of an attorney then during the early part of 1955? A. Yes.

Q. That is the same time you sent this post card in advising them of a change of address?

A. Yes, but this other case was pending at that time, and then it was won in August.

Mr. Duncan: That is all, your Honor. Thank you.

Mr. Barwick: I believe I will have the witness go back on the stand, your Honor, and ask him some further questions.

Redirect Examination

By Mr. Barwick:

Q. How long have you been sending mail registered to your draft board?

The Court: Doesn't the record show it, what he said?

Mr. Barwick: It probably does, your Honor, but it is going to take me longer to dig through it or have the jury dig through it than to ask him. If I can get the question, and he can answer it, it will save time. I can spend the time digging it through and asking him if he did it, but the jury can spend an hour——

(Testimony of Carlin Constantine Venus.)

The Court: I mean, within what period of time did he—— [87]

Mr. Barwick: I wanted to know when he first started sending registered mail to the draft board, if he recalls.

Mr. Duncan: The file will speak for that, your Honor.

The Court: You have a file of the file. The file is in evidence, the entire file. You can comment and have occasion to refer to that.

Mr. Barwick: All right, your Honor. No further questions.

(Witness withdrew.)

Mr. Barwick: Mr. Beil.

The Clerk: Will you be sworn?

EDWIN BEIL

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your name.

The Witness: Edwin Beil.

The Clerk: The first name is spelled how?

The Witness: E-d-w-i-n.

The Clerk: The last name is spelled how?

The Witness: B-e-i-l.

The Clerk: B-e-i-l?

The Witness: That is right.

(Testimony of Edwin Beil.)

Direct Examination

By Mr. Barwick:

Q. Mr. Beil, directing your attention to February, 1955, [88] you recall that particular month of 1955? A. Yes; I do.

Q. Some time during that month did you have a conversation with the defendant concerning the mailing of a card? A. Yes.

Q. Where did this conversation take place?

A. In Los Angeles.

Q. Where in Los Angeles?

A. We were living together near Sixth and Alvarado. We were staying there temporarily while we were doing a job there.

Q. And whereabouts did the conversation concerning the card actually take place? In what building, or was it on the street?

A. Well, along the street on the way to the post office.

Q. Were you going to the post office to mail any letters? A. No.

Q. You were just accompanying the defendant?

A. That is right.

Q. Was anyone else present? A. No.

Q. Would you please repeat to the Court and the jury, to the best of your recollection, what was said during that stroll to the post office? [89]

A. Well, we were discussing various things, but

(Testimony of Edwin Beil.)

he wanted to mail the draft board a card, because he thought he might be——

Mr. Duncan: I object to the manner in which the witness is testifying, your Honor. He has got to give the conversation, what was said.

The Court: Answer the question if you can.

The Witness: I don't remember word for word what was said.

Q. (By Mr. Barwick): To the best of your recollection; that is all we want. Just your best recollection. What you said, how he answered, then what you said relative to this card.

The Court: Relative to what card? He wasn't on the witness stand before; he was just put on. Now, you are calling his attention to some particular card?

Mr. Barwick: Yes; if there was a card. That is what I want to find out, what they talked about.

The Court: Lay your foundation. Go ahead.

Q. (By Mr. Barwick): You had this conversation going along the street, is that correct?

A. That is right.

Q. And you were discussing various subjects?

The Court: And he is your witness. Don't lead your witness. [90]

Q. (By Mr. Barwick): Did you discuss a card?

A. Yes; we did.

Q. Would you please tell the Court and the jury what you said relative to this card, if anything?

A. I asked him why he was sending it, and he told me that——

(Testimony of Edwin Beil.)

Mr. Duncan: I will object to any statement made by the defendant as self-serving and hearsay, your Honor. The defendant, himself, has testified, and he was perfectly capable of testifying for himself what the situation was.

The Court: I take it you want to develop whether he saw a card being mailed or something?

Mr. Barwick: That is correct, your Honor.

The Court: If such a conversation between the defendant and this witness, is that relevant?

Mr. Barwick: I believe it would become, your Honor, to corroborate the fact that the defendant testified that he actually mailed the card addressed to the Board. If another witness can say, "Yes, we discussed the card," the likelihood is there was such a card. It is all weight to the fact that the defendant mailed the card addressed to the Board, the fact they talked about it.

The Court: We haven't identified any card.

Mr. Barwick: No, your Honor.

The Court: Any particular card. You haven't identified any. [91]

Mr. Barwick: No.

The Court: Or any address on the card or to whom it was directed.

Mr. Barwick: I haven't asked him that yet.

The Court: If he saw a card and he identifies the card, he may state what he observed.

Mr. Barwick: That is true, your Honor, but this witness didn't look at the card that closely, so I can't ask him that. If I could, I would have. He

(Testimony of Edwin Beil.)

didn't see the address on the card. The only thing he knows about the card is if a conversation took place.

Mr. Duncan: I will object to the evidence then, your Honor, as being too remote. Now, the witness could have been with the defendant on a dozen occasions when cards were mailed, and it is awfully remote as to the particular card in question. If the witness didn't see the card, he is not the proper witness to testify.

The Court: The witness may testify as to what he knows from observation.

Mr. Barwick: All right. I will frame the questions in that light.

Q. Did you see the defendant carrying a postal card? A. Yes; I did.

Q. Did you see what was on the card?

A. Not all of it. [92]

Q. Did you see any of it? Was there any writing on it? A. Yes; it was.

Q. Could you make out the writing as to what it said? A. I couldn't make out the address.

Q. Could you make out any words on the card?

A. No.

Q. Did you see the defendant mail this card?

A. Yes; I did.

Q. Did he put it in the U. S. mail box?

A. Yes.

Q. In what post office station?

A. In a substation in Los Angeles.

Q. Where?

A. Sixth and Alvarado Streets.

(Testimony of Edwin Beil.)

Q. Was the card stamped?

A. Yes; it was a government post card already stamped.

Q. You saw that? A. Yes; I saw that.

Mr. Barwick: No further questions.

Cross-Examination

By Mr. Duncan:

Q. Do you remember when this card was mailed, Mr. Beil?

A. I remember it was in February. I don't know the date.

Q. February of 1955? [93]

A. That is right.

Q. Have you ever been with the defendant before when he mailed things? A. Yes.

Q. In February of 1955?

A. In the month of February?

Q. As a matter of fact, you can't say you can, isn't that it?

A. I have been with him before, and I remember that particular card because he told me what it was for.

Q. Did you see the card?

A. Yes; I saw the card.

Q. You did? A. Yes.

Q. What did it say? A. I didn't read it.

Q. It was a post card?

A. I took his word for what was on it.

Q. It was a post card?

(Testimony of Edwin Beil.)

A. It was a post card, yes.

Q. You didn't see to whom it was sent?

A. No. I took his word for where it was sent.

Q. Was it unusual for you to go with the defendant to mail a card?

A. No. We were working together. [94]

Q. As a matter of fact, what happened, the two of you were just together when he dropped a post card in the mail box, wasn't that it?

A. We were together most of the time during that period of time.

Q. And this particular card you are talking about, the two of you just happened to be together when he dropped a post card in the mail box; isn't that right?

A. No; we made a special trip to the post office at that time, that particular time.

Q. But you had done that before, hadn't you?

A. I suppose.

Q. Had you?

A. I don't remember any other mail that important that he sent.

Q. Why do you specifically remember this one?

A. Because he told me why he was sending it, and I thought that was pretty important.

Q. When did he tell you that?

A. On the way to the post office.

Q. You might as well tell us. What did he tell you?

A. He said that he had to mail a card to his draft board to give them his parents' address to

(Testimony of Edwin Beil.)

make sure they had a permanent address, because we were working different places.

Q. How do you happen to remember? That was two and a half [95] years ago, wasn't it?

A. I was living with him, and I thought that his draft classification and his relations with the draft board were more important than most letters are.

Q. But you remember specifically now that two and a half years ago you went to a mail box with him, and he told you, "I have got to mail in a change of address to my draft board"; is that right?

A. Yes; I do.

Q. Do you remember other occasions going with him to the mail box?

A. There is a lot of difference between mailing personal letters and keeping in contact.

Q. I am asking you if there are other occasions?

A. Yes.

Q. Do you remember what he mailed on the other occasions?

A. Yes. I have seen on certain occasions I remember being with him when he has mailed letters to his parents or to his cousin.

Mr. Duncan: I have nothing further.

Mr. Barwick: No further questions.

The Court: That is all.

(Witness withdrew.)

The Court: I think we will suspend at this time. We will have a recess until tomorrow at 9:45. [96]

Ladies and gentlemen, please keep in mind the

admonition heretofore given: Not to discuss this case with anyone or to permit anyone to discuss this case with you or within your presence, or to form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted to you.

Recess until 9:45 tomorrow morning.

(Whereupon, at 4:30 o'clock p.m. the court recessed until 9:45 o'clock a.m., Thursday, November 14, 1957.) [97]

Thursday, November 14, 1957—9:45 A.M.

The Clerk: The case on trial, your Honor, United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Duncan: It is so stipulated, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: You may proceed.

Mr. Barwick: At this time I would like to call Mr. McManis.

The Court: Let's see. Wasn't there someone on the stand at the time we adjourned still under examination?

Mr. Barwick: No, your Honor.

The Court: Mr. Beil.

Mr. Barwick: Mr. Beil was through.

The Court: Was he? All right.

The Clerk: Will you be sworn?

WILLIAM McMANIS

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: William McManis.

The Clerk: The last name is spelled how? [98]

The Witness: M-c-M-a-n-i-s.

Direct Examination

By Mr. Barwick:

Q. Mr. McManis, directing your attention to the period of time early in 1955, where were you living at that time? A. Modesto, California.

Q. Were you acquainted with an address known as 1431-10th Street in Modesto?

A. Yes; I was.

Q. Had you ever been at that address?

A. Yes. I had previously worked at that address, the gymnasium.

Q. In any time during the early part of 1955, did you have occasion to go back to 1431-10th Street?

A. Yes; I did.

Q. On what occasion?

A. My wife was working at the California State Employment Office, which was located near that address, and, as we traveled to and from work from our home, we would pass by that address.

Q. Did you observe any unusual activity taking place at 1431-10th Street in Modesto when you drove by? A. Yes; I did.

(Testimony of William McManis.)

The Court: Why don't you fix some dates here, so we know exactly what dates you are talking about? [99]

Q. (By Mr. Barwick): When did this activity take place?

A. It was after the first of March, 1955.

Q. And how long did this activity continue, to the best of your knowledge?

A. Up until the latter part of April, 1955.

Q. And what was the nature of the activity at that address?

A. The building was being wrecked and moved from that address.

Q. And when was it completely removed?

A. In the latter part of April. To be specific, April the 20th, 1955.

Q. Was another building put in its place?

A. Not to my knowledge.

Q. To the best of your knowledge, what was at that address after the building was removed?

A. It was a used car lot right next door, and they had taken over that property, and it was used for parking of cars.

Q. To the best of your knowledge, was any other building put on that location up until October, 1955?

A. Well, up until May the 22nd of 1955, when I left Modesto, no building was on that lot.

Mr. Barwick: I have no further questions.

Mr. Duncan: I have no questions.

The Court: That is all.

(Witness withdrew.) [100]

Mr. Barwick: The defense rests, your Honor.

The Court: Any rebuttal?

Mr. Duncan: The government rests, your Honor.

Mr. Barwick: If the Court please, I would like to approach the bench for the purpose of discussing a motion.

The Court: I am going to excuse the jury at this time. We still have to go over the instructions, and that may take a little while. I am going to excuse the jury now for another recess.

Please keep in mind the admonition.

(Whereupon, the jury retired to the jury room, and the following proceedings were held outside the presence and hearing of the jury.)

Mr. Barwick: Mr. Clerk, would you be so kind as to hand this to the judge?

At this time, your Honor, I would like to make a motion for judgment of acquittal on the following grounds:

(1) There is no evidence to show that the defendant is guilty as charged in the indictment;

(2) The government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment;

(3) The undisputed evidence shows that the defendant is not guilty as charged;

(4) The Universal Military Training and Service Act [101] as construed and applied by the regulations thereunder, and more particularly, Section 1641.3 of the Selective Service Regulations is unconstitutional, because it has deprived the defend-

ant of due process of law, contrary to the Fifth Amendment of the United States Constitution;

(5) Section 1641.3 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial, because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction;

(6) The Universal Military Training and Service Act as construed and applied by the regulations thereunder and, more particularly, Section 1642.2 of the Selective Service Regulations is unconstitutional, because it deprived the defendant of due process of law, contrary to the Fifth Amendment of the United States Constitution;

(7) Section 1642.2 of the Selective Service Regulations deprive the defendant of procedural due process of law at the trial, because it denied the defendant of his right to a full and fair hearing on the question of whether he actually received the notice requiring him to report for induction.

The Court: You read to me the sections that you have quoted.

Mr. Barwick: I don't have a copy. [102]

The Court: You should have. If you are going to quote statutes, you should be able to produce them.

Mr. Duncan: I will produce one, your Honor, that counsel can use.

The Court: In other words, your motion is purely on statutory or regulation provisions, and they are not particularly concerned with the evidence in this case.

You haven't made any point as to the insufficiency of the evidence, or anything of that kind.

Mr. Barwick: I hope to argue that more fully in just a moment as to where the evidence is insufficient.

The Court: I haven't noted it in your stating of your motion that you have alluded to the evidence in any way. You just merely talked about the law as it now stands in relation to these matters or the regulations without——

Mr. Barwick: I intend to amplify the statement as to insufficiency of the evidence.

The Court: All right.

Mr. Barwick: If the Court please, Regulation 1641.3 of the Selective Service Regulation reads, as follows:

"Communication by Mail. It shall be the duty of each registrant to keep his local board advised at all times * * *"

The Court: Do what? To do what there?

Mr. Barwick: "* * * to keep his local board advised"—— [103]

The Court: Yes.

Mr. Barwick: ——"at all times of the address where mail will reach him. The mail of any order, notice or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Now, under this regulation, your Honor, a man could never receive notice in any form, not know a

thing about it, and he would have notice. If that doesn't deprive a man of a constitutional right to notice——

The Court: Isn't there a jury here to determine whether or not he was notified? That is the factual matter that was discussed in the trial of the case, wasn't it?

Mr. Barwick: But, according to the regulation——

The Court: Do you have witnesses?

Mr. Barwick: According to this regulation, it doesn't make any difference. He is guilty whether he——

The Court: Then, what is the purpose of putting on witnesses?

Mr. Barwick: Pardon?

The Court: What was the purpose of putting on witnesses?

Mr. Barwick: Because we hoped to show that he actually didn't receive it. And, in addition, we hoped to show that this particular regulation is unconstitutional, and that [104] it should be amended. Because, if there is a conviction in this case, it will certainly be appealed on the basis of this regulation.

The Court: Is there any decision construing the matter?

Mr. Barwick: No. That regulation has never been construed, to the best of my knowledge.

Mr. Duncan: May I be heard on that problem?

The Court: When we get to it. Just a moment now. What else do you have?

Mr. Barwick: Now, the next, 1642.2.

The Court: We are not here, I don't believe, construing the statute there. You are urging that the Acts are unconstitutional?

Mr. Barwick: I am, your Honor. I am urging that these particular regulations are unconstitutional, the ones that I have cited, and they are applied in this case. They have to be; otherwise, the government doesn't have a case if they don't apply these regulations in the way they are applied. We feel these two particular ones are unconstitutional.

The Court: It is a factual situation in this particular case. You have spent practically all your time, that is, both sides, in establishing whether or not notice was given as required by the statute.

Mr. Barwick: That is true. But just because we have [105] got the evidence in that doesn't mean that the jury has to believe it in light on the regulation. The jury may come to the conclusion, "Well, they don't have to pay any attention to whether he got it or not. Under the regulation he is guilty, and that is the regulation."

The Court: All right. Go ahead.

Mr. Barwick: "1642.2. Duty. When it becomes a duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the selective service system, the duty or obligation shall be a continuing duty or obligation from day to day; and failure to properly perform the act or supplying of incorrect or false information shall, in no way, operate as a waiver of that continuing duty."

Taking this section in conjunction with the other

section, the two constitute an impossible situation for a defendant.

The Court: Hasn't that matter been determined in the case we discussed yesterday?

Mr. Barwick: It has been determined in the Eighth Circuit, but that isn't the Ninth Circuit. And the Eighth Circuit can still be wrong, and we can still urge the grounds that it is unconstitutional. In that particular case, the grounds were not urged.

The Court: In that case, apparentaly, [106] nobody——

Mr. Barwick: Nobody urged the constitutionality of the section, according to my reading of the case.

The Court: But the case could have been taken up to the Supreme Court, but nothing was done about that, was it? And it is law so far as we know it now, isn't it?

Mr. Barwick: The law insofar as that particular Circuit, says that if you have an indictment that charges a man with failure to report on one date, you can convict him of failure to report thereafter. The Circuit did not rule on the constitutionality of the provision. Maybe it was never around in the trial court.

The Court: I know, but the Circuit by the court did express itself on what it thought the situation amounted to. It is a continuing process of from day to day.

Mr. Barwick: Yes, the court did say that it was a continuing process. And, because of this, they could look into his subsequent acts, particularly in

the intent. That whole case seemed to bear on the question of intent. The court was more concerned with letting these subsequent acts show intent, but what is relevant was now it said nothing about whether the section was constitutional or unconstitutional. And we can't speculate why it wasn't appealed or what the reason was. But I intend to urge it to this court that the section is unconstitutional regardless of what the Eighth Circuit [107] says.

The Court: I don't know what was urged or what was not urged in that case. I know what the pronouncement is and the decision of the court.

Mr. Barwick: Yes. And if the judge in the court feels that that is the law in this Circuit, why then that would be your decision. But, nevertheless, I urge that it is not the law.

The Court: I will say this: That we don't have to look behind the scenes in every decision.

Mr. Barwick: No.

The Court: The decision speaks for itself. And we assume that everything that had to do with the court's pronouncement was presented to the court.

Mr. Barwick: I don't want to jeopardize my defendant by presuming that it was done in another defendant's case in this particular case. I want to urge to the Court that that regulation is not constitutional, and I particularly want to urge that in this particular case he was charged with failing to report on November 8, 1955, and no other date. And the entire indictment is framed to point to his intent, to

his duty to report on that date. Because of what this regulation says——

The Court: Of course, we haven't wandered too far away from the date in question; that is, here in this case——

Mr. Barwick: Well, not yet. [108]

The Court: The testimony is direct as to the particular date.

Mr. Barwick: Yes, your Honor, it is.

The Court: And so we are not too much concerned with continuing effects up to the present date.

Mr. Barwick: No.

The Court: If a date is established to the satisfaction of the jury, as recited in the indictment, that is the date we are talking about.

Mr. Barwick: If the evidence were limited to that date alone, it would be fine. But, as the Court knows, the Silverman case doesn't limit it to that alone, although I feel that case is wrong.

The Court: The case, of course, that we examined seems to speak on that subject matter.

Mr. Barwick: Yes.

The Court: In fact, it speaks on almost everything that we have discussed in this case, in our case on trial.

Mr. Barwick: I would like to urge one more ground for acquittal. It is not in the written grounds that I gave the Court, but I would like to urge that the government has failed in every respect to show that the notice was actually mailed.

The Court: I am concerned about that, Mr. Duncan. That is one error in your case. [109]

Mr. Barwick: If the Court pleases, there is a case—just a minute; I want to find which one it is—United States versus Rice. United States versus Rice, 281 F 326. The Court in that case said: "Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing."

The Court: You are citing a civil case, some other jurisdiction, aren't you? Isn't that a civil case?

Mr. Barwick: That is a draft case, your Honor.

The Court: A draft case?

Mr. Barwick: Yes.

The Court: There is one case recited to the same effect, I think in your instructions, didn't you?

Mr. Barwick: I prepared that instruction before I found this case.

The Court: Yes.

Mr. Barwick: Now, this is a draft case, and it goes——

The Court: What is that case?

Mr. Barwick: United States versus Rice, 281 Federal.

The Court: Versus Wright?

Mr. Barwick: Rice, R-i-c-e.

The Court: 2—what?

Mr. Barwick: 281 Federal 326.

The Court: Where is that?

Mr. Barwick: To my best recollection, your Honor, [110] it is in Texas. It was a Texas case.

The Court: It was a federal case, of course.

Mr. Barwick: Yes, a federal case. And it was dealing with the selective service law and the regulations. And the case is page after page in the decision telling what type of proof is necessary for mailing.

As the Court pointed out, further in that case—it is in my defendant's jury instructions Number 14 and 15.

The Court: Number what?

Mr. Barwick: Number 14 and 15.

The Court: That is in your instructions?

Mr. Barwick: Yes.

Now, under the rule of that case, your Honor, the government has failed to show that this notice was properly mailed. And on that basis alone, I believe the Court could find, after reviewing the law, that the government has not established or carried the burden of proof of showing that the notice was mailed, as required by law, and as decided by this case.

The Court: There is evidence in the case that the mailing was done by a clerk who had that duty to perform, another clerk. The witness who was on the stand, the clerk for the Board, testified as to the custom or the routine. She presented everything for mailing and checked everything, and then it was put in a receptacle, and then from there [111] it was taken by a mailing clerk.

Mr. Barwick: That is correct, your Honor.

The Court: There is nothing in the evidence that——

Mr. Barwick: The mailing clerk was not on the stand. We don't even know what she does.

The Court: ——nothing in the evidence to show a specific act of this mailing. Of course, we have custom. That is evidence.

Mr. Barwick: Yes, the custom.

The Court: We have the practice which is established in the mailing.

Mr. Barwick: But, if the Court please, if I could read this jury instruction aloud, it might help. It said in the case of United States versus Rice:

"To establish mailing of a letter containing notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee whose duty it was to deposit the mail in the post office that he (or she) either actually deposited that mail in the post office, or that it was his (or her) invariable custom to deposit every letter deposited in the usual receptacle."

Now, on cross-examination with this in mind, I asked [112] the clerk of the Board specifically where she posted the mail, and her invariable custom was to get it together and put it in a communication box or receptacle within the office. And she said, well, that was mailing it. And I asked her again: "Is that where the United States Government picks it up?" And she said, "No."

So there is no testimony of the employee who actually took it out of the box, invariably or by custom.

The Court: Other than the testimony of the clerk as to what the practice was and that this practice had been carried out and consistently in that manner.

Mr. Barwick: Yes, that is true. But under this case, it says there must be testimony of the employee who takes it down. And we have no testimony of the employee who regularly takes it down.

The Court: That is correct. As I said before, I am concerned about that one point.

Mr. Duncan: Your Honor, we have a presumption that the Ninth Circuit has recognized in many other selective service cases—one of them is the Kaline case. They haven't a slip opinion, but it is a 1956 Ninth Circuit case where they allude to the presumption of the regularity of the performance of official duties.

Now, that point also, your Honor, has been recognized in other Ninth Circuit cases of 1956, one of them, the Uffelman [113] case, I believe.

The Court: Does this case have to do with a situation of this kind?

Mr. Duncan: No, it does not, your Honor. It doesn't apply to mailing. But I would like to make this point: Counsel has moved for judgment of acquittal on the basis of this regulation providing that the mailing of the notice shall be deemed notice. Now, that point hasn't entered into this trial. The jury hasn't been so instructed as yet. The

motion for judgment of acquittal is not the proper time to raise this point. That has never come up. He should object to the instruction if the Court decides to give the instruction, and the Court possibly will not give that instruction. That is tied into this question of mailing. If we use that instruction, then the slight deficiency in the evidence here as to the mailing might become pertinent, but, without the use of that instruction, your Honor, this question of mailing is purely a question of fact for the jury. It is not a matter of law.

The Court: You proposed an instruction as to mailing didn't you?

Mr. Duncan, Yes, I did, your Honor, but it hasn't been given by the Court as yet. It is certainly not before the jury. I say that urging that ground on a motion for judgment of acquittal is premature at this time. Counsel might object to the instruction and then make this point, but the [114] instruction hasn't been given as yet.

Now, the government doesn't intend to rely solely on this receipt of the notice. I don't know whether he got it or not, but I intend to rely quite heavily on this continuing duty theory.

The Court: What do you say about the lack of testimony as to the actual mailing by a clerk?

Mr. Duncan: I say, your Honor, that that without that instruction being given is a question of fact for the jury. And I say this, your Honor, that if that instruction is given by the Court, the jury can also be instructed that that regulation is not to remove this element of knowingly which is

charged in the indictment. We have charged he knowingly failed to report. Now, counsel is assuming that by that regulation the government is contending that he didn't have to have knowledge. We can still argue that he is charged with knowingly failing to report.

The Court: However, a man must have notice before he can report if he is required to report.

Mr. Duncan: That goes to the essential element of the indictment of knowingly, your Honor.

The Court: We are getting back to the very point I am considering: If it is incumbent upon you to prove mailing, and that creates a presumption that notice was given as required by law or regulation, that places the burden on the [115] defendant; and he must meet it if he can. But before arriving at that point, we have the testimony only of the clerk who testified as to custom and practice in mailing, but there is no direct testimony other than the custom. Now, if that custom establishes a fact, there is a different matter. If you have some law on that subject——

Mr. Duncan: No, your Honor, I say——

The Court: But if you rely entirely upon that as the performance of the task of mailing, I am not sure about it.

Mr. Duncan: Your Honor, doesn't that become pertinent? The case counsel has cited says we must show conclusively to mailing only when that mailing is per se to give the man notice. We have to take that further step; we have to show that mailing con-

clusively only in connection with this regulation which your Honor hasn't yet given.

The Court: No, but in the ordinary events, ordinary situations—take a case that isn't a criminal case, any case. If you are going to establish the mailing of a notice, you are going to have to establish it by the person who mailed it, aren't you?

Mr. Duncan: Doesn't that go to weight, your Honor? Isn't that a question of fact for the jury?

The Court: That is what I want you to advise me of, if you have some law on that subject matter. Does that Rice case establish that in that [116] case?

Mr. Duncan: On that point, your Honor, the Rice case says where the government is going to rely on a presumption that mailing amounts to receipt, then they must show clearly the mailing. We haven't as yet relied on this point, that the mere mailing was going to be the receipt.

I may withdraw that instruction.

The Court: What you rely upon is to the fact of the giving of the notice?

Mr. Duncan: On the fact that this man was told in April of 1956, and again in April of 1957, that he had been ordered to report for induction, your Honor, and then I switch over to continuing duty, as pointed out in this Silverman case, and say that he had a continuing duty from November 8 of 1955, up to the date of the return of the indictment to report for induction; and if he had notice in any way during that period, he had a duty to report for induction.

The Court: Is it not mandatory upon a board to notify a person by mail as provided by the statute or regulation, whichever provides for it?

Mr. Duncan: The Board has. We have put on the best testimony available, your Honor. The lady who prepared the order said she prepared it, and she put it in the mail box. Now, the only step that is absent here is the individual that took it from her mail box and put it in another mail box.

The Court: Where is that individual? You [117] haven't produced him.

Mr. Duncan: We don't know who the individual is. We have custom; we have the presumption well recognized by the Ninth Circuit of the regularity of the performance of official duties. And, in the absence of an eyewitness, we have to rely on that.

Mr. Barwick: If the Court please, I would like to say something. The regulations that you asked counsel about, the regulations provide that a man must receive notice; and it provides for the board to mail him a notice. I mean——

The Court: It doesn't say that exactly. He must be given notice.

Mr. Barwick: He must be given notice.

The Court: Yes.

Mr. Barwick: The point we are driving at under the Rice case is there is no evidence sufficient to support the government's case he was given notice. If he was never given notice, regardless of the fact that already he might have looked through his file and found out about it, the Board had attempted to give notice, that doesn't put any obligation on

him. The government has got to carry the burden of showing they gave the proper notice. Then, if he later found out about it, that is where the continuing duty comes in. But he doesn't have the continuing duty until first the government has shown to the Court's satisfaction that the original notice was properly given. [118] And that is where I contend it was not, because the employee who was required to be here——

The Court: You don't need to repeat what you have already stated. You don't need to spend the time.

Mr. Barwick: Yes, your Honor.

The Court: Is there something else?

Mr. Barwick: No.

The Court: Let's look at it from another viewpoint. We have other evidence besides the evidence of the clerk. We have evidence that the defendant himself went down and discussed the matter with the clerk.

Mr. Barwick: That is true.

The Court: And now, isn't the jury entitled to take all of the evidence in the case and determine whether or not he actually did receive or had knowledge, notwithstanding anything which may appear to you to be a deficiency in the link of the process of mailing?

Now, the custom was established, and that custom prevailed. And that is the way the mail was put in the United States Post Office, in the manner stated by the clerk. Now then, wouldn't the actions of the defendant with respect to this entire matter, in

connection with interviews, and what not, wouldn't that be an element which the jury might consider, whether or not he actually received the notice?

Mr. Barwick: That is true, your Honor. But my point [119] is that the government has not made out a case yet, because one essential element of the case is that the Board comply with these steps. And I feel that the evidence is insufficient in that respect.

The Court: Is that for us to say or is it for the jury to say?

Mr. Barwick: It is for the Court to say, if another court—and you agree with that court—has ruled on the point and established whatever evidence is necessary to create the presumption. The government has to rely on a presumption in this case, that notice was duly given. Now, it is true there is a general presumption that administrative acts are carried out by official employees; but that doesn't help us here, because the Rice case says you have got to have the employee who does that act regularly, invariably, and have them testify as to what they did each day when they took the mail down, what box they put it in. And that employee was not there on the stand. There is an essential link missing. Without that link, the government hasn't established, as in their indictment, the notice and order by said Board was duly given. It wasn't duly given if they can't show they didn't mail it.

The Court: Isn't it for the jury to determine?

Mr. Barwick: Not if the Court can determine——

The Court: In other words, has the government [120] proved a prima facie case?

Mr. Barwick: I don't believe so, your Honor, under the rules of the Rice case. That is why I have included this ground in my motion for acquittal, because the Rice case discusses what is necessary.

Mr. Duncan: Your Honor, I think this is a perfect situation where a presumption of regularity in the performance of official duties has to apply. This presumption arose in precisely this situation where there were a number of employees performing these acts.

We have had the witness testify who prepared this order. She said she put the initials on it. She remembered it specifically, because she remembers this defendant. She put it in the box, and she never saw it again. And she testified what the regular custom was there.

Now, that is precisely the situation where there might be some man that that is his job to run in and out from every desk to pick up and drop these things in the mail box.

Mr. Barwick: Then, that man should have been here, under the Rice case.

Mr. Duncan: That is the reason this presumption arose, your Honor, because in business offices and in government offices there is no way of determining who picked up a particular letter. And Mr. Barwick's case is not applicable here until the government relies solely upon that regulation. [121]

The Court: There is evidence here the defendant came to the Board and went over the file, and

the clerk showed him the order for the induction. There is that evidence in the case.

Mr. Barwick: That is true, your Honor, but that doesn't bear on the question of whether he was duly given notice.

The Court: It may have some bearing on it if the jury believes that from that piece of evidence that he had received a notice.

Mr. Barwick: That is why I am making this motion, because I feel the law doesn't allow that even to get to the jury, unless the government has complied with every step in the regulation and taken every step that the regulation provides.

The Court: Furthermore, it is a matter of credibility of witnesses. The jury can disbelieve the defendant if the jury sees fit.

Mr. Barwick: That is true, your Honor.

The Court: They don't have to believe him, either in whole or in part.

Mr. Barwick: But the very basis for a motion for judgment of acquittal, to put the question to the Court: Has the government made out a prima facie case according to law? And, according to law, the government has to get the employee [122] up there on the stand that actually mailed this. It is true in civil cases, there, the presumption of regularity of administrative acts is greater; but this is a criminal case.

The Court: Furthermore, the minutes, do they not show the mailing?

Mr. Duncan: Yes, they do, your Honor.

The Court: Doesn't that appear in the minutes?

Mr. Duncan: It is in the evidence.

Mr. Barwick: In our cross-examination the clerk said that she initials that when she puts it in the inner-office communication receptacle.

The Court: I know, but, aside from that, does not the minutes of the Board show the mailing of the notice?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: Your Honor, a rubber stamp indicates "Mailed." Then, it is initialed.

Now, I ask the clerk: "Do you initial it after you put it in the U. S. mail box?" And she said, "No."

The Court: Let's look at the entry on the minutes of the Board and see what it says.

Mr. Duncan: This is it right here. That is the order, the order number, that 252, your Honor.

The Court: "Form Order 252 mailed." Now, does that mean anything on the minutes of the Board?

Mr. Barwick: No, because—— [123]

The Court: It is in evidence, is it not?

Mr. Duncan: It is an official government record, your Honor.

Mr. Barwick: Yes, but——

Mr. Duncan: Under the law it is proof of the fact there asserted.

Mr. Barwick: We have direct testimony from the clerk, your Honor, that she stamps that and puts it in the inner-office box. So, regardless of what this says, her own testimony says she put it in

the box, and she has already stamped it; and it isn't mailed. That is why I asked her.

The Court: But if she testified definitely as to the custom and practice where another clerk does the mailing, and makes an entry of it——

Mr. Barwick: That is the missing link, the other clerk. The other clerk should have been on the stand and testified as to what she did and when she did it, how she did it, even if she remembered doing it, if she could. That is what the Rice case holds.

Mr. Duncan: I wish counsel would read us the Rice case where it says that, your Honor. Counsel is citing a principle of law that I have some doubts about.

The Court: Is there any communication in the file from the defendant that he never received a notice? Did he ever notify the Board in that [124] respect?

Mr. Barwick: I am not sure. Just a minute. I believe there is a letter.

Yes. Would you like to read the photostatic copy or——

The Court: Just tell me.

Mr. Barwick: It says here on September 4, 1956—that was the letter that the Court read that we argued about and were discussing. It said: "I definitely did not receive any other induction notice; and, if I did, I would have reported as before.

The Court: What else?

Mr. Barwick: The letter is quite long. Would you like me to read the whole thing?

The Court: No.

Mr. Barwick: That is the only part. It is in that paragraph: "I have always complied with all the instructions of the Board. Never have I tried to avoid any duty by means of trickery. Therefore, I honestly object to your conclusion that I have been delinquent in advising the Board of my home address."

That is what the F. B. I. talked to him about; that they didn't have his home address.

"I concealed nothing and refused induction only because of being conscientiously opposed"—he is referring to his previous induction.

"I reported at the induction station because of [125] receiving mail at my home address at San Diego. I definitely did not receive any other induction notice." There he is referring to the fact that he received a previous induction notice and went to the induction station a couple of years prior, and that is the only induction notice he ever received.

The Court: There is also some evidence of some conversation that even if he had gotten his notice, he would have refused induction.

Mr. Barwick: That is one statement from the clerk of the board; and, yet in the very letter, he says: "I would have reported as before."

The Court: Yes, but then "to report" and "to report for induction" are two different "reports," aren't they? In other words, he would have reported, but he would not have submitted?

Mr. Barwick: He would not have submitted, that is correct.

The Court: He said under no circumstances would he be inducted; he would refuse to be inducted?

Mr. Barwick: Right.

The Court: Is that correct?

Mr. Barwick: That is right. But that has no bearing on whether he would show up.

The Court: It may not. It may not, but it is in evidence; and the jury might consider everything that is in [126] evidence. I don't know.

I am going to investigate this case here; I mean, the citation that you have. Do you have any other citations?

Mr. Barwick: No, that is the citation on the point of mailing.

Did the Court wish to read it?

The Court: I want to read it myself.

Mr. Barwick: It is quite long.

The Court: Is that the case you cited?

Mr. Barwick: Yes, this is the case.

The Clerk: The Court is now in recess.

(Recess taken.)

(The proceedings were resumed within the hearing of the jury:)

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate.

Mr. Duncan: It is so stipulated, your Honor.

The Court: Ladies and gentlemen, we have almost concluded our discussion as to some legal

matters that you are not concerned with for the moment, and we will suspend now until this afternoon at 1:45. And I hope we will be ready to proceed at that time; so please return and be here at 1:45. And keep in mind the admonition heretofore given. You are now excused. [127]

(The following proceedings were had between Court and counsel, outside the hearing of the jury:)

The Court: We will go back into chambers and finish up the discussion.

(Whereupon at 11:50 o'clock a.m. the Court recessed until 1:45 o'clock p.m. the same [128] day.)

Thursday, November 14, 1957—2:25 P.M.

The Court: Do you stipulate the jurors and the defendant are now present in this case on trial?

Mr. Duncan: I so stipulate, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: Both sides have rested, is that correct?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: Yes, your Honor.

The Court: Let the record show that prior to the beginning of the arguments counsel have been informed as to the instructions proposed to be given by the Court.

You may now proceed with your arguments.

(Then followed opening argument by counsel for plaintiff.)

(Then followed argument by counsel for defendant.)

The Court: I think we will take a recess at this time, ladies and gentlemen. It is a little warm in here, and we will see if we can cool off the court room. Take a short recess. Please keep in mind the admonition.

(Recess taken.)

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated. [129]

The Court: You may proceed.

(Then followed closing argument by counsel for plaintiff.)

The Court: Ladies and gentlemen, I am not going to instruct you this evening. It will take about forty minutes to instruct you; and, by that time, it will be after 4:00 o'clock. And that is pretty late to send a jury out to consider a case. So we will get an early start in the morning at 9:45, and you will have your instructions, and the case will be submitted to you at that time.

So we will have a recess at this time. And, again, you are to keep in mind the admonition. The case will not be completed until it will have been submitted to you after the instructions shall have been

given. Therefore, keep yourselves in that condition that you will await passing judgment in the case until after the instructions shall have been given and until you go into the jury room.

You are now excused until tomorrow morning at 9:45. Please be here at that time. Recess until that time.

(The following proceedings were had between Court and counsel outside the hearing of the jury:)

The Court: Is there anything further?

Mr. Duncan: I have nothing further, your Honor.

The Clerk: Is your Honor going to rule on that motion? [130]

The Court: Which motion is that?

The Clerk: The motion for an acquittal.

The Court: That motion, I thought I ruled on it. The motion is denied. I did it in chambers, but I neglected to announce it in open court.

(Other matters.)

The Court: Very well. Recess.

(Whereupon at 3:35 o'clock p.m., Thursday, November 14, 1957, the court recessed until 9:45 o'clock a.m. the following day.) [131]

Friday, November 15, 1957—9:45 A.M.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you stipulate the jurors and the defendant are now present?

Mr. Duncan: It is so stipulated, your Honor.

Mr. Barwick: I so stipulate, your Honor.

The Court: I am about to give the instructions to the jury in this case, and the door will be watched so that no one comes in or goes out during the giving of these instructions. Any people in the courtroom who desire to leave, either go now or wait until the instructions shall have been finished.

The instructions are an important element in the trial of the case, and I know that the jury wants to concentrate its attention on the instructions of the Court. And the purpose of guarding the doors is to see that we are not disturbed during the giving of the instructions.

First of all, I want to thank the members of the jury for their faithful attendance here during the trial of this case, and I trust that you will listen to these instructions with the same attention that you have evidenced during these proceedings.

(Then followed the instructions to the jury as read by the Court.) [132]

Friday, November 15, 1957, 9:45 A.M.

(Refer to Line 25, Page 132 of Reporter's Transcript of Proceedings which reads as follows: "Then followed the instructions to the jury as read by the Court.")

COURT'S INSTRUCTIONS TO THE JURY

The Court: It now becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in this case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment and with sound discretion, and in accordance with the rules of law now being stated to you.

The jury must accept the instructions of the court as comprising together a correct and a complete statement of law governing this case. You must not assume the existence of any law not stated in these instructions, nor are you to speculate or guess as to what the law is. And regardless of any opinion that you may have as to what the law ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any other view of the law than that covered in these instructions.

If during your deliberations doubt should arise in your minds concerning the law upon any given question, you [206] should so advise the court, and the court will then again read the instructions covering the questions as to which you may be in doubt.

This case presents several questions or propositions of law, and it is the duty of the court to instruct you fully upon each proposition. Some propositions may be covered by only one instruction,

while others may require several instructions. You must not allow yourselves to be influenced as to any question of law or fact by the number of instructions given to you upon such question. The court does not intend to stress the relative importance of any question of fact or law either by the number of the instructions given to you on a particular proposition or by the order in which all of the instructions are given. And you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all of the instructions, and as a whole, and to regard each instruction in the light of all of the others.

At times throughout the trial the court has been called upon to pass on the question whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and you are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine [207] what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any evidence which may have been stricken out by the

court; such matter is to be treated as though you never had known of it.

If during this trial I may have said or done anything which might have suggested to you that I am inclined to favor the claims or the position of either side, you will not suffer yourself to be influenced by any such suggestion; for I have not expressed, nor have I intended to express, nor have I intended to intimate any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

If any counsel has intimated by any question or in any other manner that certain hinted facts were, or were not, true, you must disregard any such intimation, and you must not draw any inference therefrom; you must not consider as evidence any statement of counsel made in your presence, unless such statement was made as an admission or as a stipulation. [208]

Keep in mind at all times that you are the exclusive judges of the facts and of the effect and the value of the evidence, but that you must determine the facts from the evidence produced here in court.

By the filing of an indictment no presumption whatsoever arises to indicate that the defendant is guilty, or that the defendant has had any connection with, or responsibility for, the acts charged.

A defendant is presumed to be innocent at all

stages of the proceedings until the evidence shows such defendant to be guilty beyond a reasonable doubt. The presumption of innocence follows a defendant to the jury room to be weighed by you as evidence along with the other evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions.

You are to decide this case solely upon the evidence that has been received by the court, and inference you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, in accordance with the law as I now state it.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is [209] direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, that is to say, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury shall be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

A stipulation by and between counsel for the parties as to any facts is binding upon you, and those facts shall be deemed by you as true in all respects,

and you are to rely thereon and you are bound thereby insofar as those particular facts are concerned.

The burden is upon the prosecution to prove a defendant guilty beyond a reasonable doubt of every element of the crime charged. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence.

The term "reasonable doubt," as used in these instructions, is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after [210] the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The requirement that a defendant's guilt be proved beyond a reasonable doubt is to be considered as included in each instruction given.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that

there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of the testimony of the witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of a mistake or by inadvertence, but wilfully and with the intent to deceive, then you may treat all of his [211] or her testimony with distrust and suspicion, and you may reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

You are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his reputation for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witness in this case, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony

given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to a plaintiff or to a defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

In using the term "witness" I refer to all witnesses both male and female. And also that term includes the defendant who, having taken the witness stand, has therefore become a [212] witness; and you are to consider his testimony the same as any other witness in accordance with all of the instructions I have and I am giving on that subject matter.

You are instructed that if the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If on the other hand, one of the possible conclusions should appear to you to be reasonable, and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable, bearing in

mind, however, that even if the reasonable deduction points to the defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty.

All testimony as to admissions alleged to have been made by a defendant outside of court should be considered with caution and weighed with care.

An admission consists of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the [213] proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.

The Indictment in this case charges that the defendant Carlin Constantine Venus, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 140, said Board being then and there duly created and acting, under the selective service system established by said Act, in San Diego County, California, in the Southern Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California,

in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

The Indictment in this case is brought under the [214] Universal Military Training and Service Act, which provides in pertinent part as follows:

> "Any person who * * * knowingly * * * evades or refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required by him under this (the Universal Military Training and Service Act) or rules or regulations * * * made pursuant to this (Universal Military Training and Service Act) * * * shall * * * be punished," as provided by law.

The Universal Military Training and Service Act, portions of which I have previously read to you, was passed by the Congress of the United States pursuant to authority given to the Congress by the Constitution to provide for the defense of the nation. You are not here concerned with the wisdom or the unwisdom of this statute. It is the duly promulgated law of the land and you must be governed by its mandate in the consideration of the evidence and in the determination of its case.

To better understand this law I shall summarize some of its provisions for you.

The law provides that it shall be the duty of every male citizen of the United States who is between the ages of 18 and 26, on the day or days fixed for registration, to present himself and submit himself to registration.

The President is authorized to select and induct into the armed forces of the United States for training and service those registrants who have been selected in an impartial manner [215] under such rules and regulations as the President may prescribe.

The Act further authorizes the President to prescribe the necessary rules and regulations to carry out the provisions of the Act, and to establish selective service civilian boards, including local boards and appeal boards. The local boards, under the terms of the Act, have power to hear and determine all questions or claims with respect to induction in or exemption or deferment from training and service, and the decisions of such local boards are final, except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

If any registrant is dissatisfied with his classification by his local board, or if his claim for exemption from service is denied by such local board, he then may appeal to his appropriate appeal board within a fixed time prescribed by the selective service regulations and may appeal from each new classification or reclassification by the appeal board.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are not to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, namely, to report for induction [216] into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly.

I am not sure whether I read this correctly. I will reread this paragraph.

You are not here sitting as a court of appeal to determine whether the local board was correct in its determination of the classification of the defendant. The local board's action is final and you are bound to accept the classification given to the defendant. You are to determine from the action of the local board and all the other evidence in the case whether there was a refusal on the part of the defendant to do what the law required, namely, to report for induction into the military service pursuant to the lawful order of the local board, and whether, if you find beyond a reasonable doubt that there was such a refusal, the defendant did so refuse knowingly.

I reread this because I thought I had misread the word during the prior reading; so you are to dis-

regard the prior reading and consider only the reading that I just finished.

You are instructed that the classification 1-A means that a registrant is available for military service.

You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find that: [217]

(1) The defendant on or about November 8, 1955, was a registrant of Local Board No. 140 in San Diego County, California.

(2) That at such time in such place, the defendant was classified in Class 1-A by said Board.

(3) That the defendant was ordered by said Board to report for induction into the armed forces of the United States on November 8, 1955, in San Diego County, California.

(4) That the defendant did on such date, and at all times thereafter, knowingly failed to report for induction.

The word "knowingly" as used in the Indictment can be taken only as meaning deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.

Knowledge and intent are each elements of the crime charged.

Knowledge may be proved by circumstantial evidence. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were

done or omitted. But what a defendant does or fails to do may indicate knowledge or lack of knowledge.

The jury should consider all the facts and circumstances in evidence which may aid determination of the issue as to knowledge, including any acts and statements of the defendant.

Intent may be established in the same manner as knowledge, as I have just instructed you. [218]

You will note that the Indictment charges the defendant failed to report for induction into the armed forces of the United States on November 8, 1955.

The selective service regulations which are passed pursuant to law provide that "When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty."

In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense charged.

The defendant is not on trial for any act or conduct not alleged in the Indictment.

You are not to consider the matter of the punishment of the defendant, in the event of a conviction.

This matter is exclusively within the province of the court and should not influence your deliberations in any way.

In some of these instructions, I may mention the jurors by the use of the masculine term. However,

when speaking of the jurors, or of the jury, I intend to include all the members of the jury, the ladies as well as the gentlemen.

The attitude and conduct of jurors at the outset of [219] their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges, The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial adminstration if you arrive at a just and proper verdict in this case. And to that end, the court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

It is your duty to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but you do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be in-

fluenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor [220] such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purposes of returning a verdict or solely because of the opinion of the other jurors.

In order to return a verdict it is necessary that each juror agree thereto. And your verdict must be unanimous.

When you retire to your jury room to deliberate, you will select one of your number as foreman, who will represent you as your spokesman in the further conduct of this case in this court. If it becomes necessary during your deliberations to communicate with the court, do not indicate in any manner how the jury stands, numerically or otherwise.

And when you have agreed upon a verdict, you will have the foreman sign the same, and you will return such verdict into court.

(Continue reading Line 1, Page 133 of Reporter's Transcript of Proceedings.) [221]

The Court: There has been prepared for your use in the jury room a form of verdict which reads, as follows:

"United States of America, Plaintiff, versus Carlin Constantine Venus, Defendant. Verdict: We, the jury in the above-entitled cause, find the defendant, Carlin Constantine Venus (blank), as charged in the indictment."

And there is a blank line for the signature of the Foreman, and the formal verdict is dated November 15, 1957, San Diego, California.

As already instructed, you will have the foreman insert in the blank space whatever your verdict may be in this case and sign the verdict and come back and report the verdict.

May it now be stipulated that there may go into the jury room, if the jury requests it, without further formality the indictment or copy thereof together with all the exhibits in this case?

Mr. Duncan: Yes, your Honor.

Mr. Barwick: If the Court please, I would like to make a motion.

The Court: Just a moment; I will give you that opportunity.

Mr. Barwick: I see, yes.

The Court: I am just wondering whether I should now excuse the jury for their deliberations or——

Mr. Barwick: I didn't want—— [133]

The Court: Whatever you have to say it should be said without the hearing of the jury.

Mr. Barwick: Yes. I didn't want them to get there and have us say it and maybe have to bring them back and send them out again. I don't know where they go to. They will have to be excused, anyhow.

The Court: If you can whisper without its being a stage whisper, as we hear in the movies.

Mr. Barwick: I doubt if I can whisper and get it across.

The Court: If it may be stipulated, we will send the jury into the jury room; and, then when you finish, then the jury may come back in——

Mr. Barwick: If necessary.

The Court: ——and we will have the bailiff sworn to take charge of them.

Mr. Barwick: Yes.

The Court: Is that satisfactory?

Mr. Barwick: Yes, that is satisfactory.

The Court: Is that stipulated?

Mr. Duncan: Yes, your Honor, I will stipulate to that.

The Court: Ladies and gentlemen, you will retire to the jury room. We will call you back shortly.

(The following proceedings were had between Court and counsel outside the hearing of the jury:) [134]

The Court: This is your opportunity—I am speaking now to counsel—to put into the record any omissions or corrections as to the instructions given by the Court:

Mr. Barwick: If it pleases the Court, I would like to refer to the instruction given by the Court. It was in four parts. It is entitled, "Defendant's Number 4," and I——

Mr. Duncan: Government's Number 4, I believe.

Mr. Barwick: Pardon me. "Government's Number 4"; and I would like to object to the inclusion in the instruction of subparagraph 4. I will read the whole paragraph, and then I will state the part I wish deleted.

"(4) That the defendant did on such date, and at all times thereafter, knowingly fail to report for induction."

I feel that this is an erroneous statement of the law and can only be corrected by deleting the words: "* * * and at all times thereafter * * *" It is the defendant's contention that he only had one duty, namely, to report on November 8, 1955, as charged in the indictment, and that any question of what he did thereafter is not competent under the charge in the indictment.

I request of the Court that the instruction be reread to the jury deleting that particular clause.

The Court: All you need to do is proceed with your objections and state them into the record.

Mr. Barwick: In connection with [135] Government's Instruction Number 7, I believe the whole instruction should be withdrawn from the jury, because it charges the defendant with a duty to report on November 8, and thereafter that he had a continuing duty to report. I feel that this is an erroneous conception of the law, that he had a duty to report, particularly in light of the fact that if the jury believes him, that he never received an order or an order was never given.

Those are the only objections to government's instructions.

I would like to request of the Court that it give Defendant's Instruction Number 12.

The Court: You have already requested that. You are now stating your objection because the Court has not given them?

Mr. Barwick: Yes. I am now objecting because the Court has not given Defendant's Number 12.

I believe that under the facts of this case the defendant mailed a letter. The jury is entitled to know that there is a presumption that the letter he mailed was received; it was properly addressed. There has been no such instruction to the jury. The jury can well find, if they were instructed, that there is a presumption that the letter had been mailed, it was duly stamped and addressed, and that the parties live at that address; that the local board receive it; and that, therefore, they had that letter and didn't send his order to [136] report to his last known address.

I object to the Court's failure to give Defendant's Number 13, in that there must arise in the juror's minds some type of presumption from the fact that the testimony stated the usual order of mailing in the government's office. However, this instruction should be given to show that there was no direct evidence that a public officer performed his duty and, therefore, the presumption that the mail was taken care of regularly should fall.

I object to the Court's failure to give Defendant's Number 14, in that in this case there is a great question of whether or not the mail was actually sent. And Defendant's Number 15 instructs the jury on the law pursuant to the Rice case as to what is necessary for the government to establish to perform its duty in making out a case of mailing a notice.

I object to the Court's failure to give Defendant's Number 18. Under the defendant's theory of the case, the jury should have been instructed that if no new notice was given, then defendant never had a duty to report.

I object to the Court's failure to give Defendant's Number 19. Under the defendant's theory of the case, he has only been charged with a failure to report on November 8, 1955, and that any evidence concerning his failure to report thereafter was not charged in the indictment and was not proper for the jury to consider. [137]

I object to the Court's failure to give Defendant's Number 20, which specifies the difference between failure to report and failure to submit. Defendant contends that whether or not he would have ultimately submitted to induction has no bearing upon the question of whether or not he would have reported; and the jury should have been so instructed in order to make up that distinction.

The Court: Wait a minute. Was there any instruction as to submitting for induction? Is that what you were talking about?

Mr. Barwick: No, there was no instruction on submitting. It was an instruction on reporting. It is two different acts. My contention is——

The Court: What is the instruction that you require?

Mr. Barwick: The defendant is charged—this is Defendant's Number 20—with failure to report for induction and not for failure to submit to induction. And, therefore, any evidence bearing on the

question of whether or not defendant intended to submit for induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report.

I object to the Court's failure to give Defendant's Number 21. Under the defendant's theory of the case, if the jury should find that an order to report was never mailed to his last known address, then they must find him not guilty. [138]

I object to the Court's failure to give Defendant's Number 23. Under his theory of the case, again, anything that took place after November 8, 1955, had no bearing on the question before the jury as framed by the indictment. In that particular instruction the jury is informed, or should have been informed, that the defendant didn't have an obligation to report if he never received the order to report as specified in the regulations.

I object to the Court's failure to give Defendant's Number 25. I believe that this instruction should have been given to the jury, so that they would know that if the defendant actually went to the local board and the Board, through its agent or employees, failed to inform the defendant what to do or did inform him that there was nothing they could do, that the government has put themselves in the position of waiving any right to have the defendant to continue to report by their own actions; and they should be estopped from prosecuting him or attempting to convict him on this continuing duty to report theory. By their own acts they have put him in a position where he failed to report because

of things actually told to him by the government's board or the clerk of that board.

I have no further objections to any other instructions, your Honor.

Mr. Duncan: The government has no objections or [139] corrections to the instructions, your Honor.

The Court: It is possible that the jury, in view of the nature of the case, may require the instructions so they can read them themselves. Is there any objection if the Court may send in the instructions?

Mr. Barwick: I have no objection, your Honor.

The Court: If they request them?

Mr. Barwick: If they request them.

Mr. Duncan: I have no objection in the event they are requested, your Honor.

The Court: Very well.

Call back in the jury.

Now, you were going to substitute, are you, the photostats of the original file?

Mr. Duncan: Not until the conclusion of the case, your Honor.

The Court: What is that?

Mr. Duncan: The original file is easier to read than the photostat. I think if counsel would rather have the originals in, I would, too.

The Court: What is that?

Mr. Duncan: Rather have the originals stay in evidence.

The Court: Yes.

Mr. Duncan: At this point, but removed or substituted at a later time. [140]

The Court: Is that satisfactory?

Mr. Barwick: That is satisfactory.

(The proceedings were resumed within the hearing of the jury:)

The Court: Do you stipulate the jurors are now present and the defendant is in court?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated, your Honor.

The Court: At this time we will excuse the alternate juror. We appreciate your attendance, and you will be notified when to appear again.

Juror No. 13: Thank you, your Honor.

The Court: The officers may now be sworn to take charge of the jury.

(The bailiffs were duly sworn.)

The Court: Ladies and gentlemen, you may now retire for your deliberations.

(Whereupon, at 10:40 o'clock a.m., Friday, November 15, 1957, the jury retired for its deliberations.)

The Clerk: Your Honor, this file may go in now?

The Court: What is that?

The Clerk: This exhibit may go in now to the jury, I take it, without further formality?

The Court: The exhibit, that is correct, without further formality. Is that right? [141]

Mr. Barwick: Yes, the original.

The Court: That is the stipulation: All exhibits

may go into the jury room without further formality.

(Thereupon, the exhibit was passed to the jury.)

The Court: Recess at this time.

(Recess taken.) [142]

Friday, November 15, 1957—2:00 P.M.

(Other matters.)

The Court: Call in the jury. Have the jury come in.

Juror No. 9: Your Honor.

The Court: Just one minute. We have one juror short. We will wait for her.

Do you now stipulate all the jurors and the defendant are in court?

Mr. Duncan: I so stipulate, your Honor.

Mr. Barwick: It is so stipulated, your Honor.

The Court: Very well. The Foreman has a request to make.

Juror No. 9: Your Honor, the jury has a request here I would like to have clarified. Shall I read it or give it to the bailiff?

The Court: You give it to the bailiff, and I will read it.

(Pause.)

The Court: I can reread any instruction you desire. Is there some instruction you desire to have reread? What instruction is that we are talking about?

Juror No. 7: You had a lot—excuse me, Judge, but you had a lot of instructions, and for me to go back and specify which one you are referring to—but, if I may orally, [143] what I am interested in——

The Court: Now, just a moment, please.

Juror No. 7: Yes, sir.

The Court: Who is the Foreman?

Juror No. 7: This gentlemen here.

The Court: The jury speaks through the Foreman.

Juror No. 7: Thank you, sir.

The Court: Anything you have to ask, you consult with the Foreman and let him make the request, unless he knows your request at this time.

Juror No. 9: I am interested from 28 on.

The Court: I will read the question as you have it: "Does the order reading to report for induction in the Board 140 office legally obligate the defendant to report for induction?"

All I could do is read you the instructions on that subject matter. That is the only way I can answer that.

Juror No. 7: That won't clarify nothing.

The Court: Then, you will have to deliberate on the facts and heed the instructions that were given. I could read to you the instructions that I have given on that subject matter.

Juror No. 7: Judge, I am sorry, I can't——

The Court: If you want to consult, you may go back and consult in the jury room. [144]

Juror No. 7: I don't think that is necessary, Judge.

The Court: Listen, this is no place to be arguing the case.

Juror No. 7: I am not arguing, sir, but I have told the chairman just exactly what I wanted presented to the Judge.

The Court: I am sorry, you will have to make your request through the Foreman. So maybe you had better go back into the jury room, so he will be fully informed as to just what you want to know; then he can make your request.

Juror No. 9: I think, your Honor, we will go back into the jury room.

The Court: I think you might go back to the jury room. If you want the instructions, I will send you in all the instructions I gave you, if that is what you want. If you have only one or two instructions you desire read, let us know which ones they are, and I will read those. Now you can go back in the jury room and deliberate.

(Whereupon, at 2:11 o'clock p.m., the jury returned to the jury room for further deliberation.)

The Court: Will counsel come forward here. We can discuss the matter now. They want the instructions, so I will send the instructions in there.

You remember that one instruction I interpolated into the record as to the witnesses, the masculine term applying to both female and male witnesses;

and I stated that was also [145] applicable to the defendant? You remember that?

Mr. Barwick: Yes, I remember.

The Court: So, I did not read the instruction that I usually give, in view of that interpolation. However, I don't have the verbatim interpolation that I made. So, if it is agreeable to you, I will send in—this is the part here.

Mr. Barwick: In substance, I assume it is about the same.

The Court: What is that?

Mr. Barwick: In substance it is about the same?

The Court: Yes. Here it is: "When a defendant has become a witness and has testified, you are to estimate and determine his credibility in the same way you would consider the testimony of any other witness in accordance with the instruction given on that subject matter."

But we can have it read.

Mr. Barwick: No, that is not necessary.

The Court: If you have no objections, I can send that in in lieu of the interpolation.

Mr. Barwick: That will be satisfactory.

Mr. Duncan: The government has no objection, your Honor.

The Court: All right.

Then, I may have interpolated a word or two here and there without taking away the context of the instruction. [146]

And, furthermore, some of these instructions have citations that I didn't read. Is there any objection to

sending these in with those citations in, or shall we strike them out?

Mr. Barwick: I prefer that the citations in the defendant's instructions, particularly——

Mr. Duncan: Government's instructions.

Mr. Barwick: Government's instructions.

The Court: Be eliminated, is that it?

Mr. Barwick: Be eliminated, if possible, or mask over them.

The Court: I will do that in yours also.

Mr. Barwick: That is fine.

The Court: If we are going to eliminate one side, we will eliminate them all.

Then, I had headings. You see, "Evidence Stipulated by Counsel."

Mr. Barwick: That is all right.

The Court: Do you object to these headings remaining?

Mr. Barwick: No.

The Court: And something like that, you see, "Burden of Proof," and——

Mr. Barwick: No objection to the classifications on them.

The Court: And here is some "Caljic," and all that. [147]

Mr. Barwick: No, that is perfectly satisfactory.

The Court: "Baji"—B-a-j-i—"25."

Mr. Barwick: That is all right.

I just believe there are one or two by the government in the case that have a citation. There are only two of them, of government's, I think, maybe three. Number 3-A, Number 5——

The Court: Wait a minute until I get to them. Number 3-A. I will just delete that.

Number what?

Mr. Barwick: 5.

The Court: Number 5.

Mr. Barwick: And Number 7.

The Court: Number 7?

Mr. Barwick: Yes.

The Court: I will leave this in. Some of these instructions I may have mentioned to the jury about the use of the masculine term, and so forth.

Mr. Barwick: That is right.

The Court: I may have interpolated on that instruction. There is no objection?

Mr. Barwick: There is no objection, your Honor, to that.

The Court: Let's see. I don't think I gave any of your instructions.

Mr. Barwick: No. [148]

The Court: There is nothing to delete, is there?

Mr. Barwick: No.

The Court: Very well.

I am now handing the instructions as I have them here to be sent into the jury room, to counsel for their perusal, before sending them in there.

Mr. Duncan: The government is satisfied, your Honor.

The Court: Subject to the interpolations and corrections that I may have made as I read the instructions.

Mr. Barwick: It is satisfactory to the defendant. No objection.

The Court: Let me see that. Just a minute. There is one place where I want to strike out a plural. Here is a duplication. I want to take one of these out about the use of the male term to include a female. There is another one in there.

I will strike out the words "presumption and inference." Here, I struck that out. Here it is. I will change it to "* * * each element of the crime charged."

Will you bring me the fastener?

The Clerk: Here, Judge. See if this will work.

The Court: All right. That catches it.

I am now handing the instructions to the clerk, as you have seen. It may now go into the jury room as stipulated by counsel. [149]

(Other matters.)

The Court: Recess at this time.

(Whereupon, at 3:00 o'clock p.m., a short recess was taken until 3:05 o'clock p.m.)

The Court: Call the case.

The Clerk: The case on trial: United States versus Venus.

The Court: Do you now stipulate the jurors and the defendant are present?

Mr. Barwick: I so stipulate, your Honor.

Mr. Duncan: It is so stipulated, your Honor.

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

Juror No. 9: We have, your Honor.

The Court: Just hand it to the clerk, please.

(Pause.)

The Court: The clerk will read the verdict.

The Clerk: "United States District Court, Southern District of California, Southern Division. United States of America, Plaintiff, versus Carlin Constantine Venus, Defendant. Verdict: We, the jury in the above-entitled cause, find the Defendant, Carlin Constantine Venus, Guilty as charged in the Indictment. James R. Lewis, Foreman of the Jury. Dated: November 15, 1957; San Diego, [150] California."

* * *

Monday, December 2, 1957—10:00 A.M.

(Other matters.)

The Court: Next matter.

The Clerk: Number 2. United States versus Venus.

Shall I call the motion for new trial first, your Honor? It also is on for sentence.

Mr. Barwick: Ready for the defendant, your Honor.

At this time I would like to renew the motion for judgment of acquittal based on the following grounds:

(1) That there was no evidence to show that the defendant is guilty as charged in the indictment. On this particular ground I would like to renew the Court's attention to the case of United States versus Rice, 281 Federal 326.

The Court: Is that something you have already cited?

Mr. Barwick: Yes, your Honor. That is the case having to do with the customary practice in mailing within a government office and the testimony necessary to establish proof of mailing. I believe the Court did look at that case in chambers.

That is the only case, your Honor, that I have been able to find on this particular point. The burden of proof, of course, is on the government to show that the notice to report was mailed. As the Court well remembers, there was very little evidence at the trial as to whether or not there was [158] a usual custom or practice in the office. There was absolutely no evidence that this particular card was mailed. The jury had to rely entirely upon a custom. There was no instruction given by the Court that the law says that there is a custom or that the government, in a criminal case, is entitled to rely on the presumption of regularity in administrative acts. The jury merely had to speculate and guess that this card got mailed. Under the rules of the Rice case, more than mere speculation is required. That particular case—and it is the only case I could find in the federal courts on the point—spells out quite emphatically that you either have to have the employee who mailed the letter there to testify that it was mailed or that the employee must testify that it was his or her duty to always mail such letters; and that they always did mail such letters and put it in a specific box.

The Court: Give me that citation again.

Mr. Barwick: 281 Federal 326.

The Court: 281 Federal 3—what?

Mr. Barwick: 26.

The Court: The name of the case?

Mr. Barwick: It is United States versus Rice. It is cited in——

The Court: What is the date of it?

Mr. Barwick: I believe it is 1922, your Honor.

The Court: Get me that. [159]

Mr. Barwick: It arose out of the draft in World War I. And at the time I read the case I was wondering whether or not there was the provision in there similar to the provision in this case: That notice mailed is good notice. In other words, once it is put in the mail, whether you receive it or not, it is good notice. And they had a similar regulation at that time, too, and the court didn't discuss it.

The second ground for motion for judgment of acquittal is that the government has wholly failed to prove a violation of the Act and regulations by the defendant as charged in the indictment. The government in this case has taken two swipes at the defendant: One, they claim that the notice was mailed, he got it, and he ignored the order. The evidence that he got it was most inconclusive. In fact, the uncontradicted evidence showed that he couldn't have possibly received it. The building to which it was mailed was gone. It was never returned to the government. The defendant testified he left no forwarding address, because he expected no more mail at that address; and this in light of the fact that he had mailed his forward-

ing address to the draft board. So, the undisputed evidence shows that the defendant never received it. In addition, the evidence shows he never received his 1-A card. If the defendant had received his 1-A card, he would have appealed that 1-A. He claims that he was entitled to a 4-D classification. Right on the card it tells you you have [160] ten days to appeal. The defendant knows this, because he appealed once before. It only seems reasonable to believe that if he got the 1-A card at the same address the order went to, he would have appealed. The very fact that he didn't go down and appeal his 1-A would substantiate the fact that he didn't get the order to report; because they were both mailed to the same address within a thirty-day period.

Now, the second swipe that the government has taken at the defendant is based on a continuing duty to report theory. I contend that there is no such duty to report, unless the defendant actually knew that there was such a regulation; and then, he had the intent to violate that regulation. The government never asked the defendant. There was never any evidence in the trial to show that this defendant knew he had this continuing duty. There was no presumption that he knows the law; no such instruction was given to the jury. In other words, the jury merely speculated on the question. Now, he saw the order; he must know he has got to report. But the jury should not be entitled to speculate, your Honor. The government must show by the evidence that this man knew he had a duty

to report. The very fact that he wrote two letters to the draft board would indicate he didn't know what he was supposed to do. And, in his own testimony—I am not contradicted by the clerk of the Board—he asked her what he was supposed to do. And he still wasn't told. This does not [161] sound like a man who knew that he had a continuing duty to report.

The Court: May I ask you this question?

Mr. Barwick: Yes, your Honor.

The Court: Why should he ask the clerk when he had an attorney whom he was consulting? The evidence showed he had consulted an attorney. There is no provision requiring the clerk to give him legal information. Doesn't this involve a legal situation?

Mr. Barwick: There is no duty required by the clerk to tell him he had a continuing duty to report. However, there is a duty on the government to make every effort to locate the man once he is delinquent. And the draft board file shows that, although they knew the address of the parents, they made no attempt to contact this man for almost a year after he was delinquent.

Now then, as to the man's having an attorney, that is true in the first case in 1955, he had an attorney; but, when that case was dismissed, he no longer had an attorney. That was in Los Angeles.

The Court: Why was it dismissed? It wasn't developed in this case. I am wondering what happened to that first case.

Mr. Barwick: In that case, your Honor, the

man was classifiied 1-A. He filed a C. O. Form for conscientious objector. [162]

The Court: You mean the defendant here?

Mr. Barwick: Yes, the defendant. He was classified 1-A. He had filed a Conscientious Objector Form. A report was mailed by the F. B. I. He was never given the F. B. I. report to look through it, so at his hearing he could rebut the evidence within the F. B. I. report.

The Court: It was failure to give him the F. B. I. report?

Mr. Barwick: Yes. Under the Supreme Court decision pending at that time — in other words, almost all the local cases were held up that were on that point until the Supreme Court decided it was a violation of due process not to give him the F. B. I. report. Since he didn't get it, his case was dismissed.

The Court: That was for violation occurring — what date was the first case?

Mr. Barwick: The first case, he refused to submit to induction in 1954.

The Court: 1954. And the case was dismissed when?

Mr. Barwick: In June of 1955, or July. The Supreme Court case was decided in June of 1955.

The Court: And this prosecution was begun when?

Mr. Barwick: In 1957, in August.

The Court: 1957.

Mr. Barwick: So, in June of 1955, he had an attorney, [163] but that case was over with.

The Court: The only point that you have then is the failure of this defendant to receive the card, and receive the notification?

Mr. Barwick: He failed to receive notice, and he was unaware that there was a continuing duty to report.

The Court: He was unaware?

Mr. Barwick: Yes. There was no evidence in this trial that he knew. The government never asked him did he know. In fact, your Honor, he didn't know. He didn't know two weeks before.

The Court: Isn't there evidence that the F. B. I. man told him something?

Mr. Barwick: No, your Honor. The government's attorney in his argument said that, but the testimony at the trial was this: The government attorney told him, "You are delinquent because you have failed to keep the Board notified of your address." That was the testimony. Now, to substantiate that testimony, we have the following act: The next day he wrote a letter to the Board. In that letter, the first thing he told them was: "My new address is * * *" Because that is what the F. B. I. man had told him: "You are delinquent because the Board doesn't know where you are." And that letter is in the file.

The Court: Is there any evidence fixing definitely [164] the date that this building was torn down?

Mr. Barwick: Yes, your Honor. Mr. McManis testified that in February of that year the building was being demolished. That in March the building

was completely demolished. And the used car lot next door took it all over for parking. In fact, your Honor, off the record, Mr. McManis wired the owner of the car lot just before the trial and received a telegram that there was no building there; that it was for parking. Of course, that is not evidence.

The Court: Is there any evidence to the whereabouts of the defendant at the time it was torn down?

Mr. Barwick: Yes, your Honor. The testimony showed that he was back in San Diego; that he had left; that he left Modesto and — were you in San Diego or Los Angeles?

The Defendant: San Diego.

Mr. Barwick: Oh, yes, your Honor, he was. He had a San Diego address at that time, because he left in February of 1955.

The Court: Left where?

Mr. Barwick: Left Modesto.

The Court: And in February of 1955, at that time the building was in the course of being destroyed?

Mr. Barwick: Yes.

The Court: And he left knowing that. There is nothing in the evidence to determine that. [165]

Mr. Barwick: No, there was no evidence. He didn't know the building was being destroyed. His employment was terminated there, so he left. There was another witness that knew this building was being destroyed, because he was still in Modesto. But this man didn't know the building was being destroyed.

The Court: You say he was in Modesto at the time the building was being torn down?

Mr. Barwick: The other witness was. Not this man. This man didn't testify about the building's being torn down. He didn't know. He didn't find out that until——

The Court: When did he leave Modesto?

We are not trying to inject some new evidence in the case.

Mr. Barwick: No.

The Court: I am just trying to refresh my recollection.

Mr. Barwick: He said January he left Modesto, your Honor.

The Court: Is that in the evidence?

Mr. Barwick: I don't recall whether it was asked. It probably is, your Honor, that he left in January. And the other witness testified that in February the building was commenced being torn down.

Now, the jury under that evidence, I don't see how [166] they could possibly find that the man received his card, particularly in light of the fact that the 1-A card went to the same address; and that had the defendant gotten it, he would have gone down to his Board the next day to appeal.

The government knew where he was, your Honor, at this time, because he was out on bail. Weren't you?

The Defendant: Yes.

Mr. Barwick: He was out on bail at this time, because the other case was pending. The United

States Government had no trouble finding him when they wanted him, because the first case was not decided until June. And in February, he left Modesto. So that the government, the United States Marshal, had no trouble finding him. When he wanted him, all he did was pick up the telephone and find his parents and say, "Tell Mr. Venus to get down here."

The Court: Let's see. The indictment is dated what day?

Mr. Duncan: August 8, 1957, your Honor.

The Court: Let's see. The evidence shows that he was in the office of the selective service board in April of 1957, and he looked through the file.

Mr. Barwick: That is correct.

The Court: And made copies of it; that is correct.

And that is the time that it was stated he asked the clerk what to do; is that right? [167]

Mr. Barwick: Yes, your Honor.

The Court: What did he do following that date, April the 7th, and before the filing of the indictment?

Mr. Barwick: After that date, your Honor, he did nothing except wait for the government to tell him what to do. That is what he was told. In other words, the clerk of the Board told him, "It is out of our hands. We can't do anything." So he just waited to find out. He had done all he could do. He went down to the Board and asked them, "What should I do?" And they didn't tell him anything.

That is where a person is supposed to go when they want to know something about their draft status.

The Court: I take it from your argument—of course, we are arguing the legal questions involved.

Mr. Barwick: Yes, your Honor.

The Court: That no matter what would have happened, he would have refused to have been inducted; is that right?

Mr. Barwick: Definitely, your Honor.

The Court: In other words, wouldn't that be an administrative matter rather than a matter for the Court as to his classification? Now, you are trying to work out a classification here that you think he is justly entitled to.

Mr. Barwick: No, your Honor. I am trying to show the Court that this man has not violated the law; that he didn't wilfully refuse to report. He would have reported. [168] That is true he reported before, but he would not submit.

The Court: The sum and substance of that argument is: Even though he claims he did not violate a law, he still was not willing to be inducted?

Mr. Barwick: That is correct, your Honor.

That is correct, but there is one small thing in between: If this man is acquitted, the Board will be forced to send him a 1-A. At the time they sent him the last 1-A, under the ruling in United States versus Dixon he is entitled to a 4-D classification; and he can substantiate that before the Board. Now, the Board, by sending him the 1-A—he didn't get it—they know about the United States versus Dixon, and they know what is in this man's file in support

of his claim of United States versus Dixon. And he can establish now that he is entitled to a 4-D. The United States Government was very generous in saying, "We will dismiss if this man will only submit." But they aren't generous enough to say, "We know he is entitled to a 4-D. We will send him another 1-A for a year."

The Court: He never had claimed any status prior to his first registry? When he registered, he registered the same as anybody else, is that right?

Mr. Barwick: That is correct, your Honor.

The Court: He didn't make any claim at that time?

Mr. Barwick: Not at that time, because he wasn't [169] entitled to it. But the man has since. Since early 1955, this man's status has changed.

The Court: What is the provision of the law in that respect, so far as the duty of the selective service board is concerned?

Mr. Barwick: The selective service board must consider any new evidence that is offered into the file and review the classification and determine whether or not, under the new evidence offered, the defendant is entitled to a different classification. Now, that is the law. But as applied to Jehovah Witnesses, it works this way: The minute they make a claim for any other status than 1-A, the Board turns them down, expecting them, knowing full well they will come in and appeal it; because that gives the Board the opportunity to use the services of the F.B.I. in determining whether the defendant is conscientiously opposed to war. The F.B.I. then makes

a complete report. And the practice of the local boards is to let the Appeal Board determine whether or not the defendant is entitled to a claim other than 1-A; because they get this full report that they are not entitled to at the local board level.

The Court: Suppose that he actually had been inducted. According to your theory, he would have had the right to change his classification right then and there?

Mr. Barwick: Actually been inducted? [170]

The Court: Yes; after his induction?

Mr. Barwick: No, your Honor, he can never change his classification unless he appeals within the ten-day period. That is the whole crucial thing: If this man had got the 1-A card, he would have been down there within the ten days, because, if he let that ten days go by, he is dead, he is administratively. He hasn't followed all the administrative steps, and, as the Court well knows, if you fail to follow one administrative step, the Court cannot help you. No matter what you can prove, you have got to take your administrative steps.

The Court: We will take a look at this case of United States versus Rice for a minute.

(Pause.)

The Court: Isn't there a notation on the minutes of the proceedings of the Board that this notice was mailed?

Mr. Barwick: That is correct, your Honor.

The Court: What about that?

Mr. Barwick: If the Court will recall, on cross-

examination I asked the clerk of the Board when they made that notation. She made that notation when they put the letter in the box in the office.

The Court: Can we go behind those minutes?

Mr. Barwick: I don't see why not, your Honor.

The Court: Isn't there a record? Isn't that a part—— [171]

Mr. Barwick: That is part of the record, but the direct testimony of the witness can always amplify or clarify what the record means.

The Court: I can't quite reconcile the last two paragraphs of this opinion, Page 335, with what you say the law to be with respect to the mailing, if I read this correctly. I take it that when this opinion says, Page 335, "Here the important facts are established by circumstantial evidence in the most complete and explicit way"—of course, there is considerable quoting from Corpus Juris and other authorities of other cases. And Justice Hutcheson quotes from some of those authorities. But the syllabus, unless you read the entire case portion of it, seems to be based on some of the quotations rather than the case itself here; the law of the case being established by this decision.

I take it this is the opinion of the Court, the: "Here the important facts are established by circumstantial evidence in the most complete and explicit way: (1) There was an office, the sole duty of which was to check delinquents; (2) this office was organized with the utmost care to accomplish the purpose intended; (3) in preparing notices to delinquents the originals and carbons were always pre-

pared at the same time, with their date for mailing written on them; (4) that they were kept together, and were together sent to the Adjutant General, where the original was signed by him [172] and the two returned to the office; (5) that here they were separated, the carbon then and only then going into the permanent file, the original in the mail; (6) that there was a carbon copy of the notice to Helmecke made on November 9, in the Helmecke file; * * *"

That probably refers to the other cases cited in this Rice case, is that correct?

Mr. Barwick: I believe.

The Court: The Helmecke case is another case. (Continuing:) "* * * (7) that provision was made to have these letters placed in the mail; and (8) that they were uniformly so placed.

"The detail of the wealth of these circumstances shows that the evidence now offered is not only sufficient to support an inference that the letter in question was prepared and mailed, but in the light of reason is not reconcilable with any other inference. I am therefore of the opinion that the fact upon which the authority of the court-martial rests, to wit, that the induction notice was mailed to Helmecke, has been established absolutely, affirmatively, and unequivocally, and that the writ of habeas corpus applied for should be denied; and it will be so ordered."

This is the United States versus Helmecke. He is the one that is involved in this case. I thought there was another case. [173]

Mr. Barwick: I guess Rice is the commanding officer.

The Court: This is United States ex rel. Helmecke versus Rice, Post Commander, etc. Helmecke is the litigant in this case?

Mr. Barwick: Right. In that particular case, your Honor, the court did point out, though, what was necessary to establish the mailing.

The Court: Yes.

Mr. Barwick: And it pointed out that you either got to have an employee there who customarily and regularly did it, and that employee must testify as to the steps they took. Otherwise, the court points out there is no evidence. But in this case the testimony is repeated, or right in the opinion. The testimony of the clerk is right there as to what they did and how they were instructed to do it in our opinion case. We have nothing. We are merely guessing that ordinarily letters that are addressed go out in the mail. That isn't enough to send a man to prison in a criminal case. In a civil case you might have some authority for saying that, "Well, a person stamped and addressed it. It probably got mailed." But, even then, by experience we know that things stamped and mailed don't always get sent in the mail. Consider the number of husbands that come home at night with letters still in their pockets.

The Court: In this case, apparently, the proof was [174] made by custom.

Mr. Barwick: That is correct, your Honor.

The Court: In the Helmecke case.

Mr. Barwick: Overwhelming custom.

The Court: But custom. But I am looking for the portion which says that the man, the clerk, who actually mailed, did so. I don't see that in there.

Mr. Barwick: No. The court pointed out you either have that or the testimony of the clerk who performed this custom. As I recall in this case, there is a section in there that tells about the clerk who performed the custom, and that clerk was on the stand and testified what they did, and how she was instructed to do it. And the court found that because of this testimony of the clerk who ordinarily performed it—and she testified as to what her instructions were, and that she always carried them out in this way—but there was enough circumstantial evidence to show that in this particular case, even though she couldn't actually remember mailing this correspondence, there was circumstantial evidence of mailing.

The Court: The case cites: "In the course of the cross-examination it was made plainly to appear that Adjutant General Harley knew none of the facts that he had testified about of his own knowledge; that he testified only from records; that he identified the photostat copy, because it was a copy of the regular form used, and that his testimony that the [175] original was mailed to Helmecke was based entirely upon the custom of his office; that he knew nothing personally about the mailing, or about the making of the original notice; that he had no personal knowledge whatever about any of the matters testified to, and that his testimony was simply from his general knowledge of how the affairs of

the office of the Adjutant General were conducted; that he had no personal knowledge, nor did he ever have any personal knowledge, of the military status of the defendant, Helmecke, but that he testified from his knowledge of the rules and regulations made and established by the Provost Marshal General for the conduct of the draft, which were followed very carefully. He stated specifically that he did not mail the notice, that he did not know who mailed it, that he did not make out the notice himself, and that he could not state who made it. He further testified that he had no personal recollection with reference to the notice; that he did not sign all the notices that were sent out; that it was his understanding that all copies sent out and all notices issued were signed, or sent under his direction."

Then, on Page 329, it goes on: "It is therefore evident that the single question in this case is whether or not the evidence shows, in that clear, unequivocal, and certain way, that the jurisdictional fact, to wit, that the notice was mailed to Helmecke, has been established." Then there [176] are some cases cited. Then the language further recites: "In all those cases it was conceded that notice was mailed; the mere question was whether it was necessary to prove that it had been received, and, if so, whether the evidence sufficiently showed the receipt. Here, if the notice was mailed, Helmecke was inducted; if it was not mailed, he was not inducted. The determination of this single question, whether the evidence shows the mailing, determines whether

the application of the relator shall be granted or denied."

Apparently, there is a rehearing in this case from the original hearing. There was a subsequent rehearing. This matter was before the court at a previous hearing. "It was then held that the testimony offered in the court-martial proceedings and submitted on the application for the writ, which consisted of no direct evidence that the notice in question was actually mailed, but merely of photostat copies of the reports made and the notice claimed to have been issued in the Helmecke matter, together with the oral testimony of the Adjutant General * * *"

Then, there was additional testimony offered. And also Brophy, the mailing clerk here, apparently testified as to the custom of handling the mail, and so forth.

Mr. Barwick: That is correct, your Honor. That is the particular point wherein this case before us is lacking.

The Court: There was testimony in this case as to custom, too. [177]

Mr. Barwick: She was not the mailing clerk, your Honor. She was just the general clerk of the Board. She testified that someone else took the mail.

The Court: She testified the custom was for this mail to be deposited in the receptacle, and the mail clerk could then pick it up and mail it.

Mr. Barwick: Yes, but under the case, your Honor, the mailing clerk should be there to testify

how she did it, under what circumstances, what her instructions were.

The Court: And, apparently, this custom that he testified to, that after the mail was deposited in the pouch which hung at his desk, this clerk, this mailing clerk, and of causing the mail to be carried to the post office by Tom Brown for mailing. I don't know whether Tom Brown testified. I don't think he did in this case. And he was the one who actually mailed it, Tom Brown, the mailing clerk. Tom Brown did testify that he had been a porter for twenty-three years, and he also testified as to the custom. But there was no direct testimony that anybody mailed this particular piece of mail. It all came through the custom of the operation.

Mr. Barwick: That is correct, your Honor.

The Court: Although, they had a little more evidence than there was in this case. They had evidence of the mailing clerk and the fellow that carried the mail to the post office.

Mr. Barwick: Yes, your Honor. [178]

The Court: But all he testified to was to the custom.

Mr. Barwick: That is right.

The Court: All he testified to was the custom.

Mr. Barwick: Yes.

The Court: Can you analyze this case any differently?

Mr. Duncan: I don't see what difference it makes as to who testifies to the custom, your Honor. You have got the same testimony in this case you had in that case.

The Court: It is more refined in this case; the connection was a little more direct as to the custom. Here we have the testimony as to the custom only from the clerk of the Board.

Mr. Duncan: We have got additional testimony, additional evidence here, your Honor, with a notation made in the file. I think your Honor has to consider all of those things. I think the testimony in this case is every bit as strong as the testimony in that case. This is the first time I have known that the case has gone the way it has gone, as counsel has cited it, the proposition that the evidence was insufficient. As I understand the case, it held the evidence was sufficient.

The Court: I beg your pardon?

Mr. Duncan: This case held——

The Court: There was on the rehearing.

Mr. Duncan: I think the evidence here is every bit [179] as strong as there, your Honor.

Counsel is urging, as a matter of law, that there was insufficient evidence here to go to the jury, and I think the Court is entitled to consider all of the evidence. Now, in this case, the controlling thing in this case was the mailing; and in our case here there was all this other evidence that the Court was entitled to consider about whether or not there was sufficient evidence to go to the jury.

The Court: The court used pretty strong language here based on custom rather than actual mailing of the particular piece of mail. The court says: "I am therefore of the opinion that the fact upon which the authority of the court martial rests, to wit,

that the induction notice was mailed to Helmecke, has been established absolutely, affirmatively, and unequivocally; * * *"

Mr. Barwick: That is correct, your Honor. But in that case there is far more testimony than we have in this case. The clerk in a couple of sentences testified: Well, she put it in the box, and someone took it out and mailed it.

If the government means that that is the same as the Rice case, I fail to see the connection. In the Rice case they specifically laid out step by step. There could be no doubt as to what took place in that office.

The Court: The only steps that were taken were steps by custom, according to the testimony. [180]

Mr. Barwick: That is correct. I am not urging that the government in every case has to get the employee to testify "I saw the letter, and I saw it addressed, and I put it in the box." That is an impossible burden. But it is incumbent upon the government, under the Rice case, to do more than just say, "We usually mail the letter, and we usually put them in that box, and someone takes them out."

Mr. Duncan: Counsel is arguing about who has to testify as to custom. That is his whole point. And what difference does it make who testifies to the custom? The testimony is the thing that counts, not who testifies to the facts.

The reason for these presumptions and for hearsay exceptions is that in exactly these situations we have to rely on custom, your Honor. What individual that carried the mail from one box to another

would remember this specific day and what he had done? It is just impossible. The clerk testified that she had prepared it, that she put it in her out box, that she stamped the fact on the file, that she had mailed it. She also testified that she prepared the duplicate order, and then, on cross-examination, she went completely into the custom. And counsel is saying there is no evidence in the record whatsoever to indicate that it was mailed.

Mr. Barwick: According to the Rice case, as I read it—and I took it out of the case—it says: There must be [181] testimony of the employee whose duty it was to deposit the mail in the post office. There must be testimony.

Now, it says——

The Court: But there wasn't any more than the custom.

Mr. Barwick: That is true. Now, it goes on to say she must testify, the employee, she actually deposited it or it is her invariable custom. But here we don't even have the employee whose duty it was to deposit it in the mail box.

The Court: I don't see how three or four people who carry out a customary procedure, if it is all based on a matter of custom, would minimize the testimony of a clerk who customarily did this and did that; and she placed it in an envelope and properly addressed it, placed it in the receptacle; and that it was custom for the mailing clerk to take it to the post office; she made note of it in the record. Had the mailing clerk also testified, he couldn't have testified that this piece of mail was in there.

Mr. Barwick: No, your Honor. But under the Rice case, all he has to do is to get up there and tell that he usually does it, how he usually does it. After all, we can't speculate on what he is going to testify. We can't say he is going to testify to help the government or to help the defendant. That is why we want him on the stand.

The Court: I think the trouble was in this other case, this Rice case, that the Adjutant General—wasn't it in this Rice case? [182]

Mr. Barwick: The Adjutant General merely testified——

The Court: However, the Adjutant General testified he knew nothing about it, about the matters that were important in that case; that he was just testifying more or less from what he was told and what he knew generally.

The language says: "In the course of the cross-examination it was made plainly to appear that Adjutant General Harley knew none of the facts that he had testified about of his own knowledge; that he testified only from records; * * *" and so forth.

Here we had the clerk who testified that she kept the minutes; she made those entries; and that she did the mailing. That is to say, she did the addressing. She had to do with the mailing of the notices, and that the notices were deposited in the proper receptacle; and there was a custom and usage for that to be taken out daily, or more often—I don't know—but, at least, daily, and by the mail clerk who

redeposited the United States mail; and that was the custom and usage. And it had prevailed and still prevails. That is the gist of her testimony.

Mr. Barwick: That is correct, your Honor.

Mr. Duncan: She was a recipient witness. And that is all that case is asking for, your Honor. The Adjutant General there wasn't a recipient witness, and they had to supply that missing link. We put a recipient witness on the stand. [183]

Mr. Barwick: That indication goes further than just any witness. It actually says it must be the testimony of the employee.

The Court: I think this case can be differentiated to some extent from our case. I think here we have a pretty fair record of what happened insofar as the records of the Board are concerned and the handling of the records and all of the details.

Mr. Barwick: I would like to continue then and specify another ground. The Universal Military Training and Service Act, as construed and applied by the regulations thereunder, and, more particularly, Section 1642.2 of the Selective Service Regulations, is unconstitutional.

The Court: I have read your motion.

Mr. Barwick: Oh.

The Court: You are reading now from the motion?

Mr. Barwick: I am rereading the motion, your Honor.

The Court: Yes. I don't think it is necessary to reread it. As I recall, it attacks the constitutionality of the Act.

Mr. Barwick: Yes.

Now, I would like to point out, your Honor, that under that particular regulation this situation could apply, and I contend it happened in this case: The Board can make out a notice; they could lose it, never mail it. Or, if they [184] did mail it, the defendant never received it. Yet——

The Court: There are other facts in this case as to presumptions, other elements of this case than presumptions.

Mr. Barwick: Presumptions as to what?

The Court: As to knowledge.

Mr. Barwick: The man is presumed to know the law?

The Court: In this case, the defendant here went to the office himself and had the records and looked at them. And if there is anything wrong with them, he could have—that is before the time of the indictment——

Mr. Barwick: Yes.

The Court: ——he could have made his wants known there. Instead of that, he said, "Well, what will I do?" What a question to ask of the clerk of the Board: "What shall I do?" That is a legal question, purely a question for a lawyer to answer; a matter, even if she had told him, it wouldn't have bound the Board. It wouldn't have had anything to do with what the regulations require. It is merely a matter of information. Suppose she gave him the wrong information. Supposing she said, "Well, you just forget about it." Would you think he would rely upon that information?

Mr. Barwick: Legally, he proably couldn't. But, your Honor, how many times does the average citizen go down to an administrative agency or government agency and they ask the clerk at the counter for the information? They expect that [185] a person who is working for that agency knows the rules and regulations or, at least, will send them to someone who does know. This defendant came down there in good faith. He wanted to know what he was supposed to do. Now, the ultimate fact that he would not submit to induction has no bearing——

The Court: You are probably right in that respect.

Mr. Barwick: Because he went once before knowing he wasn't going to submit.

The Court: There is another element we musn't overlook. The jury can believe or disbelieve any person. I don't know what goes on in the jury room. That is their business. But, apparently, the jury believed the testimony that was supplied by the government's witnesses.

Mr. Barwick: There was only one government witness, and all that clerk testified to was the fact the notice was sent.

The Court: Yes.

Mr. Barwick: There was nothing in the government's case to show that the man had knowledge at all.

The Court: You have involved a question of fact there. You rely upon the fact that the mail could not have reached the defendant because the building was torn down. The clerk testified there was no mail re-

turned. If it had not been delivered, we know, as a matter of fact, that the mail comes back to the sender, particularly this kind of mail. [186]

Notices of that kind are usually registered, are they not?

Mr. Barwick: No.

The Court: Certified?

Mr. Barwick: No. They are sent by plain government frank.

The Court: What mail is certified and registered? There is some testimony here in this case.

Mr. Duncan: That was the change of addresses, your Honor, sent by the defendant to the Board. But the Notice to Report for Induction wasn't sent out by registered mail.

The Court: No.

Mr. Duncan: I might point out, your Honor, though, as I told the jury, in order to believe the defendant's story—there are three pieces of mail here which were lost in the mail, all of them crucial to this case. You have to believe that three pieces of mail ran astray. And that is just hard to believe.

Mr. Barwick: Yes, counsel did point that out to the jury. But the funny thing is one of those three pieces—this man wouldn't be in court today if he got it. And that is the 1-A classification card; because he would have gone down to the Board and appealed it, and we would have no case. He would have had the 4-D, or he would have had a chance to the 4-D he is entitled to, or thinks he is entitled to. [187]

Mr. Duncan: That is a question of fact, and the jury made a determination on that.

Mr. Barwick: Yes. In other words, your Honor, the jury determined that he got two of the pieces, but he didn't get the third.

The Court: It probably might be. I don't know. I don't know what the jury determined. It must have determined something along that line; otherwise, they would have believed the defendant.

Mr. Barwick: To continue with my argument on the motion for acquittal: Under the government's theory, a draft board can make up a notice, stamp it "Mailed," according to the testimony, and it could be lost or destroyed. It might never get mailed. But in their records it says, "Mailed it; been made up." Then, the defendant never knows about it; and then, he comes down to the Board one day and goes through his file, maybe a year or two later, and says to the clerk, "Oh, I see I have been ordered to report. What do I do now?" And the clerk says nothing to him. She says, "It is out of our hands." And he goes away. Under the regulations, he may have a duty to report, but under the very same regulations the order has never been sent. It is my theory, your Honor, that the regulations are inconsistent; because under 1642.2, it is requiring the defendant to report for induction, whereas, in fact, the Board may never have sent the order to report. And by——

The Court: How about the presumption existing? We have got to take that for some value. There is a presumption that if a letter is mailed, addressed, and stamped—in this case it didn't need to be stamped—there is a presumption that it has been

delivered; is that right? Isn't that a legal presumption?

Mr. Barwick: There is a legal presumption, your Honor, that a letter properly addressed and mailed and sent to the addressee, and the addressee lives at that address, has been received.

The Court: All right.

Mr. Barwick: There is a case on that, and I ask——

The Court: The letter was mailed, from the records and from the testimony, to an address which is the last address known to the Board as far as the record shows.

Mr. Barwick: That is correct. But that isn't what the presumption is.

The Court: You and I can't change the facts as they were developed at the trial of the case. We can't change the circumstances surrounding this entire transaction. We have to take the record as it stands.

Mr. Barwick: That is correct. But there arises the presumption of fact that the addressee of a letter received it. It must first be proved it was properly addressed.

The Court: Pardon me just a moment.

(Off the record discussion.) [189]

Mr. Barwick: But no set presumption arises unless it appears that the person to whom sent resided at the place to which it was mailed. And there are two Federal citations for that proposition, your Honor. In other words, that presumption doesn't arise in this case, because he didn't reside at the

place it was sent. So the government, under the regulations, can never send a letter and yet, at the same time, can hold a man guilty because he has this continuing duty to report. I contend that this regulation is unconstitutional, because it does deprive him of due process of law. He can't ever go behind it and say, "Well, you didn't mail me the regulation." The government has relied on the regulation you have to report regardless whether we mailed it.

That is all I have with respect to the motion for judgment of acquittal, your Honor.

The Court: The motion is denied.

Mr. Barwick: And now, on the motion for new trial: The same arguments that were presented in the motion for judgment of acquittal are presented in the motion for new trial with the addition that the Court erred in charging the jury and refusing to charge the jury as requested. Namely this: The defendant requested that an instruction be given on mailing; namely, Defendant's Number—just one moment.

The Court: I think we covered that pretty well in our discussions in chambers. [190]

Mr. Barwick: Yes.

(Continuing): ——Defendant's Number 12.

The Court: Yes.

Mr. Barwick: That was requested.

Now, under the evidence, your Honor, as presented, the jury, under this instruction, could have found that the defendant never received the 1-A

or the order, because he had shown that the building wasn't there. They could have believed him.

The Court: They could have found it, too, based on the evidence if they had seen fit to do it. They didn't. They didn't need any instruction. He testified directly on that subject matter.

Mr. Barwick: Yes, correct. But the defendant also testified that he mailed a card with his new address to the Board. If this instruction had been given, the jury could have found that that letter was received, because it meets all the requirements of the presumption. And, if in fact, the jury had been instructed to that effect, they could have found the notices sent to him were not received because of the direct testimony and relying on the presumption the defendant's notice was received by the Board and the Board failed to send the card to his last known address; that, in fact, the Board didn't receive them because of this presumption and has failed in its duty. Under the regulation, the Board is required to send a [191] notice of classification to his last known address. And for that reason, I submit that a new trial should be granted. In reviewing the evidence under a motion for new trial, as the Court is well aware, it sits more or less as a thirteenth juror. Whereas the Court might waive a presentation in favor of the government for a denial of a motion for new trial, I feel there are many things in this case which are too weak for a reasonable, fair-minded person to consider in substantiating the government's claim.

Thank you, your Honor.

The Court: The motion is denied.

Mr. Barwick: At this time, your Honor, is it appropriate to make a motion to continue the defendant on bail pending the filing of a notice of appeal?

The Court: You will have to have a judgment of the Court first, won't you?

Mr. Barwick: Oh, I'm sorry, your Honor. That is why I asked if it were appropriate.

The Court: Let's see.

(To Bailiff): Will you look on my desk and get the probation report?

We will take a few minutes recess; about ten minutes.

(Short recess taken.)

The Court: This is the time fixed for sentence in the case before the Court. [192]

Certificate

I hereby certify that I am a duly appointed, qualified and acting court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing Pages 1 to 203, inclusive, are a true and correct transcript of the proceedings had in the above-entitled cause on November 13, 14, 15, 1957, and on December 2, 1957, and that said transcript is a true and correct transcript of my stenotype notes.

Dated at San Diego, California, this 10th day of February, A.D. 1958.

/s/ MALCOLM E. LOVE,
Official Reporter.

[Endorsed]: Filed March 14, 1958. [204]

[Title of District Court and Cause.]

DOCKET ENTRIES

8/ 8/57—Ent. ord. & fld. Indict., bond fixed at $2,500. Ent. ord. for issg. B/W. Issd. B/W to Mars. Md. JS-2.

8/15/57—Fld. $2,500. Bond, with sureties, posted 8/14/57. (Hocke.)

8/21/57—Fld. B/W—Retd. Execu.

9/30/57—Ent. proc. arr. TN; K. Barwick, atty.; ent. plea N/G assign J. Weinberger; ent. ord. settg. for jury trial 10/15/57, 9:45 a.m. (JW.)

10/15/57—Lodged waiver of jury trial & ent. proc. & ord. allowing withdrawal of waiver. Ent. ord. settg. for jury trial 10/29/57, 9:45 a.m. (JW.)

10/29/57—Fld. on 10/28/57 waiver deft's appear. Ent. proc. & order. cont. to 10/31/57, 9:45 a.m. for trial. (JW.)

10/31/57—Ent. proc. cont. to 11/13/57, 9:45 a.m. for trial. (JW.)

11/13/57—Ent. proc. on impanelmt. jury & jury trial; fld. exhs. & sw. wits.; ent. ord. cont. to 11/14/57 for fur. trial. (JW.)

11/14/57—Ent. proc. fur. jury trial; fld. requested instrucs. of plf. & deft.; ent. ord. cont. to 11/15/57 for fur. trial. (JW.)

11/15/57—Ent. proc. fur. jury trial; ent. ord. & fld. & ent. verdict G; ent. ord. ref. P/O for I & R & cont. to 12/2/57, 10:00 a.m. for sent., rem. on bd.; ent. ord. for substit. photocopy for Ex. 1 & fld. receipt. (JW.)

11/20/57—Fld. not. of intent to move for new trial; Fld. renewal of mot. for judgmt. of acquit.; fld. mot. for new trial. (JW.)

12/ 2/57—Ent. proc. hrg. mot. deft. for judgmt. acquittal & ent. ord. denyg. mot. Ent. proc. hrg. mot. deft. for new trial & ent. ord. denyg. mot. Ent. proc. sent deft. 18 mos. & fine $500; exec. stayed to 12/13/57, 10 a.m.; fld. judgmt. & issd. copies; ent. judgmt. 12/6/57; Md. JS-3. (JW.)

12/10/57—Fld. Notice of Appeal of deft. from judgmt., with affid. serv. on U. S. Atty.

12/13/57—Ent. proc. & ord. fixing bd. on appeal at $4,000, to be approved by Judge Weinberger & fur. stay exec. judgmt. to 12/20/57, 10 a.m. (JW.)

12/18/57—Ent. proc. & ord. exec. judgmt. fur. stayed to 12/27/57, 12 noon. (W.) Issd. abst. to Mar.

12/26/57—Fld. Bond on Appeal of deft. $4,000.00.

12/30/57—Fld. Prae. and issd. abstract of judgment.

1/14/58—Fld. affid. re extension of time to docket appeal, until 3/15/58. Fld. ord. granting ext. of time re docket of record of appeal 'til 3/3/58. (JW.)

1/29/58—Fld. deft's desig. of contents of record on appeal.

2/24/58—Fld. affid. K. Barwick re extension of time to docket appeal. Fld. Ord. (JW) extending time to docket appeal to 4/3/58. (JW.)

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify the foregoing items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 63, inclusive, containing the original:

Indictment.

Government's Requested Instructions to the Jury.

Defendant's Jury Instructions.

Verdict.

Minute Order, 11/14/57.

Motion for New Trial.

Renewal of Motion for Judgment of Acquittal.

Minute Order, 12/2/57.

Judgment.

Notice of Appeal.

Order Granting Extension of Time re Docketing of Record on Appeal, filed 1/14/58.

Designation of Contents of Record on Appeal.

Order Granting Further Extension of Time for Docketing of Record on Appeal, filed 2/24/58 (copy). Docket Entries.

Amended Designation of Contents of Record on Appeal.

Points to be Relied Upon on Appeal.

B. Government's Exhibit No. 1.

C. One volume of Reporter's Transcript of Proceedings had on: 11/13/57; 11/14/57; 11/15/57 and 12/2/57.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: March 28, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 containing the original:

Supplemental Designation of Contents of Record on Appeal.

B. Reporter's Transcript of Proceedings had on: November 15, 1957.

I further certify that my fee for preparing the foregoing record, amounting to $0.75, has been paid by appellant.

Dated: April 28, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15953. United States Court of Appeals for the Ninth Circuit. Carline Constantine Venus, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15953

CARLIN CONSTANTINE VENUS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

POINTS TO BE RELIED UPON ON APPEAL

Appellant intends to rely upon the points urged before the District Court and will contend that the District Court erred in the following respects:

1. In overruling the objection to the admission of any testimony concerning evidence happening after November 8, 1955.

2. In failing to find an insufficiency of evidence to establish the mailing of the Notice to Report for Induction which support the indictment to the defendant.

3. In failing to find that the verdict of the jury was contrary to the weight of the evidence.

4. In failing to find that the verdict was not supported by substantial evidence.

5. By failing to find that the Universal Military Training and Service Act as construed and applied by the regulations thereunder, and more particu-

larly Section 1641.3 of the Selective Service Regulations, is unconstitutional because it deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

6. In failing to find that Section 1641.3 of the Selective Service Regulations deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

7. In failing to find the Universal Military Training and Service Act and the regulations thereunder, more particularly Section 1642.2 of the Selective Service Regulations as construed and applied to the facts of this case, are unconstitutional because they deprived the defendant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

8. By failing to find that Section 1642.2 of the Selective Service Regulations deprived the defendant of procedural due process of law at the trial because it denied the defendant of his right to a full and fair hearing upon the question of whether he actually received the notice requiring him to report for induction.

9. In giving Government's Instructions to the Jury Nos. 4 and 7 and in charging the jury over the objections and exceptions to the Court's charge.

10. In failing to give defendant's Jury Instructions Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

11. In failing to grant defendant's motion for judgment of acquittal and the renewal thereof.

12. In failing to grant defendant's motion for new trial and the renewal thereof.

/s/ HAYDEN C. COVINGTON,

KENNETH A. BARWICK,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed April 2, 1958.